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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 194.

WALTER BOHALL, PLAINTIFF IN ERROR,

vs.

D. N. DILLA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED APRIL 10, 1882.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Transcript on Appeal.*

In the Supreme Court of the State of California.

D. N. DILLA, Plaintiff and Respondent,
vs.
WALTER BOHALL, Defendant and Appellant. } No. 7178.

Transcript on Appeal.

S. M. Buck, attorney for appellant; J. J. DeHaven, attorney for respondent.

Endorsed: Filed May 12th, 1880. F. W. Gross, clerk, by C. Harlan, deputy.

Due service hereof admitted, this 30th day of March, 1880.

J. J. DEHAVEN,
By HUNTER,
Attorney for Plaintiff & Respondant.

2 *Complaint.*

In the Supreme Court of the State of California.

In the District Court of the 8th Judicial District, in and for the County of Humboldt, State of California.

D. N. DILLA, Plaintiff, *vs.* WALTER BOHALL, Defendant.

The said plaintiff for his cause of action against said defendant alleges:

That the plaintiff was, upon the 13th day of January, A. D. 1877, and still is, the owner in fee-simple of all that lot of land situate in the said county of Humboldt, State of California, described as follows, to wit:

The southwest quarter of section twenty-nine, township seven north, range one east, Humboldt meridian.

That the said defendant, upon the 13th day of January, A. D. 1877, entered into possession of said land without license from the plaintiff, and adversely to him, and ever since said date has
3 withheld, and now withholds, the possession thereof from the plaintiff.

That the value of the rents and profits of said land is eight hundred dollars per annum, and that by reason of the withholding of the said land from plaintiff by the defendant, the plaintiff has been deprived of the use and occupation of the same, and by the continuance thereof will be deprived of the use and occupation of the same, to his loss and damage in the sum of eight hundred dollars.

Wherefore the plaintiff demands judgment against said defendant for the restitution and possession of said land, and for the sum of eight hundred dollars, damages for the withholding thereof, together with his costs of suit.

CHAMBERLIN & DEHAVEN,
Att'ys for the Plaintiff.

Duly verified.

(Endorsed:) Complaint. Filed June 1st, 1877. W. J. McKenna, clerk, by John Miller, deputy.

Answer and Cross-Complaint.

[Title of Court and Cause.]

For answer to the complaint on file herein defendant denies that plaintiff was, on the 13th of January, 1877, or at any other time, the owner in fee-simple, or the owner at all, of the land in said
4 complaint described; and denies that the value of the rents or profits of said land is eight hundred dollars per annum, or any other or greater sum than one hundred dollars per annum.

And for a further and separate answer and cross-complaint defendant alleges that at all the times hereinafter mentioned defendant was, and still is, a citizen of the United States, over the age of twenty-one years, and the head of a family; that on October 27th, 1862, defendant purchased from William M. Bohall the possessory right to and improvements upon the land in said complaint described, viz: The southwest quarter of section twenty-nine (29), township seven (7) north, range one (1) east, Humboldt base and meridian. Said land was at that time unsurveyed and belonged to the United States, and was open and subject to pre-emption settlement. That the improvements upon said land so purchased by defendant consisted of a dwelling-house, barn, and inclosed and cultivated fields and pasture. That defendant, immediately after said purchase, entered upon and into possession of the said land, and continued to hold and possess said land until the 23d day of March, 1865; and from thence hitherto has and still does own all the improvements thereon. That on the 23d day of March, 1865, plaintiff willfully designing to cheat, wrong, and defraud defendant out of and from his said possession and improvements upon said land and the value thereof, and his rights to pre-empt the same, by false and fraudulent representations and promises, induced plaintiff to sign a written paper, of which the following is a copy:

5 *Contract of Sale of Real Estate.*

EUREKA, HUMBOLDT CO., CAL., *March* 23, 1865.

This contract is concluded and perfected this day between Walter Bohall, party of the first part, and D. N. Dilla, party of the second part, both of the place aforesaid. Walter Bohall, for and in consideration of the following payments made to him or assigns by the party of the second part, or his assigns, the sum of six hundred dollars, fifty dollars of which is this day received, and is hereby acknowledged, one hundred dollars the 1st of August next, use at one per cent. per month till paid, and four hundred and fifty dollars the first of April, 1866, with a continuance of time of payment if needed, on last-mentioned amount, six months, and use at ten per cent. per annum, covenants to convey to the party of the second part, his heirs or assigns, all the following described quarter section of land in Klamath county, California, being on the south end of a tract of

land known as Dow's Prairie, commencing at the southeast corner of William Underwood's claim on said prairie; from thence south one-half mile; thence east one-half mile; thence north one-half mile; thence west one-half mile to the place of beginning; together with all the tenements, hereditaments, and appurtenances thereto belonging, or in anywise appertaining.

In witness whereof, I have hereunto set my hand and seal.

[SEAL.] WALTER BOHALL.

6 That the land described in the paper of which the foregoing is a copy is the same land in controversy herein, and in said complaint described. That plaintiff then and there verbally agreed to and with defendant to comply with the terms of the offer in said written paper contained for the purpose of getting into possession of said land and premises, and wronging and cheating defendant, who, believing plaintiff was acting honestly and in good faith in the premises, let plaintiff into possession of said premises; that plaintiff did not accept the offer of defendant contained in said written paper in good faith, and plaintiff did not at any time intend to comply with the terms thereof; and defendant was induced to sign said writing and put plaintiff in possession of said land, as aforesaid, by the said false and fraudulent representations and practices of plaintiff. That after getting into possession of said land in the manner as aforesaid, plaintiff denied that defendant ever had any right or title to said land or improvements, or that he, plaintiff, had agreed to comply with the conditions or terms of said written paper, or that he was bound by any condition in said written paper contained. That thereafter, and on the 7th day of September, 1866, defendant commenced an action in said eighth judicial district court in and for the county of Klamath, State of California, against plaintiff herein, to recover possession of said land from plaintiff; that such proceedings were had in said last-mentioned action that on the 20th day of April, 1868, judgment was duly given to the effect

7 that defendant herein should have and recover of and from plaintiff herein the possession of the said land and premises, being the same land in said complaint described; that thereafter, and while said judgment was in full force and effect and unreversed, a writ of execution, duly tested, was duly issued out of said last-named court in said last-named action, addressed and delivered to the sheriff of said Klamath county, whereby said sheriff was commanded to place defendant herein in the quiet and peaceable possession of the lands and premises in said judgment and writ of execution described, being the same lands in controversy herein; that under and by virtue of said writ of execution issued as aforesaid said sheriff did, on the 5th day of May, 1868, place defendant in possession of the lands and premises in said writ of execution described, being the same land in controversy herein, and from thence hitherto defendant has been, and still is, in the quiet and peaceable possession of said lands and premises; that thereafter, and on or about October, 1874, a new trial was had in said last-named action, and upon such new trial had before said court without a jury said

court duly found as findings of fact that said defendant, Walter Bohall, on the 23d day of March, 1865, made the defendant the written offer to sell him, D. N. Dilla, plaintiff herein, said premises, said offer being the written paper, a copy of which is hereinbefore set forth; also, that said D. N. Dilla verbally agreed to and with said Bohall to comply with the terms of said written offer, and gave said Bohall fifty dollars for the purpose of getting into the possession of said land and premises, and that said Bohall, believ-
8 ing said Dilla was acting honestly and in good faith in the matter, put defendant into possession of said premises, but defendant never accepted said written offer in good faith and never intended to comply with its terms, and that said Bohall was induced to sign said written offer by the false and fraudulent representations and practices of said Dilla; also, that said Dilla denied that said Bohall ever had any title or right to said land to sell to said Dilla, or that he, said Dilla, ever agreed to comply with the terms of said written offer, or that he was bound by its terms; that said facts so found by said court in said action were material to the issues then being tried in said action; that afterwards, and in December, 1874, judgment was duly given in said last-named action by said court upon said and other facts therein found, to the effect that said Bohall should have and recover from said Dilla the possession of said land and premises; that in the summer of 1868 defendant settled upon the said land with his family with intent to pre-empt the same, and from thence hitherto has, and still does, reside upon said land with his family, and during all said time defendant has not had or owned any other house for himself and family, and during said time defendant has made extensive and valuable improvements upon said land, relying upon the right to acquire a title to the same from the United States by and through its so-called pre-emption laws; that defendant was not at any of such times, nor is he now, the owner of three hundred and twenty acres of land, nor of any land; that defendant did not quit nor abandon his residence on his own land to reside on said
9 land. That plaintiff herein did not at any time improve said land nor erect or own a dwelling-house thereon; and plaintiff has not resided upon nor inhabited said land nor any portion thereof since May 5th, 1868. That plaintiff herein never reduced any of said land to his possession; and never had possession of any portion thereof, except the improvements belonging to defendant, which he procured by fraud, as hereinbefore set forth. That plaintiff claimed as a pre-emptor, by his notice duly recorded on August 13th, 1866, forty acres not included in the land in controversy herein, which record remained uncancelled at the time defendant made actual settlement on the land in controversy, by which the southwest quarter of said southwest quarter of section twenty-nine (29), in said township, was open to settlement by said Bohall; that by said notice said Dilla claimed forty acres adjoining the land in controversy herein, from which he was not ejected by said writ of execution, and which he might have improved and resided upon at all times; and that said Dilla voluntarily abandoned all of said land in 1868, and has never occupied, improved, or re-

sided upon any portion of said lands since, although he has been at liberty so to do. That on October 2d, 1873, said township seven (7) north, range one (1) east, Humboldt meridian, was surveyed by the United States Government, and on that date the approved plat thereof was duly filed in the proper register's office in Humboldt land district, State of California. That on the 3d day of October, 1873, defendant duly filed in said register's office his declara-
10 tory statement in writing as required by law, wherein he set forth and declared his intention to claim the southwest quarter of section twenty-nine (29) in said township seven (7) north, range one (1) east, Humboldt meridian, as a pre-emptor, and therein further set forth that he was a citizen of the United States, and the head of a family, and that he had settled upon said land on October 22d, 1862. That thereafter defendant was cited to appear at the United States land office in Humboldt land district, in Humboldt county, State of California, and before the register and receiver thereof to contest the right of plaintiff to pre-empt said land in said complaint described; and in obedience to said citation defendant appeared before said officers of said land office at said land office, in March, 1875, and plaintiff appeared at the said time and place, and a contest was then and there had before said register and receiver between plaintiff and defendant as to their respective rights to pre-empt said land; and at said contest upon the trial thereof, defendant proved by competent evidence all of the matters and things hereinbefore in this separate answer alleged, to the satisfaction of said register and receiver; and said register and receiver found said matters and things so alleged as aforesaid to be true. That the writ of execution hereinbefore mentioned by virtue of which said sheriff placed defendant herein in the peaceable possession of the premises in controversy, in May, 1868, as aforesaid, was by said sheriff on the 18th day of May, 1868, duly returned into said district court in and for said Klamath county, with his return thereon,
11 showing the same had been duly and fully served; and the said writ of execution then and there ceased to have any further force or effect. That thereafter, and on the 11th day of July, 1871, said judgment of said district court upon which said writ of execution issued, was reversed by the supreme court of California, and a new trial granted; that a new trial was thereafter and on the 20th day of September, 1873, had in said action and judgment duly given to the effect that said Bohall, defendant herein, have restitution and possession of said land; that thereafter, and on August 13th, 1874, said last-named judgment was reversed by the supreme court of California, and a new trial granted. That a new trial was thereafter had in said action, whereupon judgment was again duly given to the effect that said Bohall, defendant herein, have and recover of and from said D. N. Dilla, the plaintiff herein, the possession of said premises; which last-named judgment has ever since been and still is in force and effect. That the record of all of said proceedings in said action of Walter Bohall against D. N. Dilla, was produced and admitted in evidence at said contest; and said register and receiver, and thereafter the Commissioner of the General

Land Office, and thereafter the Acting Secretary of the Interior, by mistake, and by an erroneous and mistaken conclusion of law from said record, found as a fact that said writ of execution had been since May, 1868, in full force, and that said Dilla could not at any time after 1868 have gone upon said land without resisting
12 an order of said district court, and being in contempt of said court, which conclusion of fact was clearly made by mistake.

And as conclusions of law, from all the foregoing facts so as aforesaid found, said register found that said land should be awarded to defendant; and said receiver, erroneously and by mistake, found, as his conclusion of law from said facts, that said land should be awarded to plaintiff herein; that said decisions of said register and receiver were afterwards reviewed by the Commissioner of the General Land Office upon the evidence adduced by said parties before said register and receiver, and their findings and decisions thereon so as aforesaid by them made; and upon additional and *ex parte* affidavits and evidence sent to said Commissioner by plaintiff herein; and said Commissioner thereupon erroneously and by mistake of law, in addition to the evidence taken at said contest between said parties, and the decisions of said register and receiver so as aforesaid made thereon, considered *ex parte* evidence sent him by plaintiff so as aforesaid; and thereupon, and on January 6th, 1876, erroneously and by mistake of law, found, as a fact from said evidence, decisions, and *ex parte* evidence, that since 1868 said Dilla has been unable to make a residence upon the land in controversy without being in contempt of said district court, which finding by said Commissioner is untrue both in law and in fact. Also that defendant had failed to comply with the requirements of the pre-emption law as regards residence, in that defendant had not continually resided upon said land from his settlement thereon in 1868 up to the date of said contest; which
13 finding by said Commissioner is untrue both in law and in fact; and said findings by said Commissioner were made erroneously and by mistake of law; and thereupon, upon all of said facts found by said register and receiver and said Commissioner, said Commissioner adjudged that said Dilla was entitled to said land, which decision was made by mistake of law, and by wrong conclusions of law from said facts admitted, proved, and found. That thereafter, and within the time allowed by law and the regulations of the General Land Office, and by the decision of said Commissioner, defendant appealed from said decision of said Commissioner to the Secretary of the Interior; that thereafter, and on September 26th, 1876, Charles F. Gorham, Acting Secretary of the Interior, found from the evidence introduced at the said contest before said register and receiver, and from their decisions thereon, the same facts, so as aforesaid found by said register and receiver, and hereinbefore alleged and set forth; and thereupon, said Acting Secretary of the Interior erroneously and by mistake of law, upon said facts, decided that said Dilla should be allowed to pre-empt said land; which decision was made by said last-named officer by mistake of law and by wrong conclusions of law from said facts, admitted, proved, and found, and without any power or authority to make such decision.

That thereafter, and on December 29th, 1876, defendant tendered and offered to the register and receiver of the said land office, at their said land office, to make to them proof of all facts entitling him to pre-empt said land, and to pay for the same; but
14 said register and receiver then and there refused to allow defendant to make such proof or pay for such land; which refusal was made by mistake of law. That thereafter, and on January 6th, 1877, plaintiff went to said land office before said register and receiver, and upon making proof of all the facts hereinbefore alleged, and none other, was allowed to pay for said land, and thereupon said officers of the land office issued to plaintiff evidence of title necessary to pass the legal title of the United States Government to plaintiff herein; all of which was done by said register and receiver, Commissioner of the General Land Office, and Acting Secretary of the Interior by mistake of law, and contrary to equity and good conscience. That from thence, hitherto, plaintiff has held and still does hold the title to said land, so as aforesaid procured from the United States Government in trust for defendant herein.

Wherefore defendant prays for the judgment and decree of this court: 1st. That plaintiff holds the title to the said land in trust for this defendant, and that plaintiff convey the same to defendant by proper deed; that if plaintiff fail or refuse to make such deed within ten days after the making and entry of said decree, then that the clerk of this court shall execute in the name of and for plaintiff, and deliver to this defendant, a good and sufficient conveyance of said land; and until such conveyance be executed that such decree shall stand for and operate as a conveyance of said premises to defendant; and for such other or further relief as may be equitable and according to good conscience, and for costs.

S. M. BUCK,
Attorney for Defendant.

15 Duly verified.

Endorsed: Answer. Filed July 30, 1877. W. J. McKenna, clerk.

Plaintiff's Answer to Cross-Complaint.

[Title of Court and Cause.]

And now comes said plaintiff, and for answer to the "further and separate answer and cross-complaint" of defendant, denies that the said defendant has at all times since March 23d, 1865, owned or that he now owns all or any of the improvements upon the land described in the complaint herein, and in said answer and cross-complaint, and denies that on the 23d day of March, 1865, or at any other time, this plaintiff, willfully or otherwise, designing to cheat or wrong or defraud said defendant out of or from his possession of or improvements upon said land, or the value thereof, or his right to pre-empt the same, by false or fraudulent representations or promises, induced the defendant to sign the written paper set out in defendant's answer and cross-complaint, and therein denominated a "contract of sale of real estate." Said plaintiff admits that he

verbally agreed with defendant to comply with the terms of said contract, but denies that he did so for the purpose of wronging or cheating said defendant, or that defendant was induced to
16 sign said contract by any false or fraudulent representations or practices of plaintiff; and plaintiff in this behalf avers that he entered into said contract with defendant in good faith, and with the intention of complying with all the terms thereof. Denies the allegation that he, plaintiff, ever denied that he had agreed to comply with the conditions or terms of said contract set out in defendant's answer and cross-complaint, or that he at any time denied that he was bound by the conditions or any condition of said contract.

Said plaintiff admits that he was ejected from the premises described in the complaint, by order of the district court of the eighth judicial district of the state of California in and for the county of Klamath, on or about May 8th, 1868, and while the judgment of said court was in full force and unreversed; but plaintiff avers that after the reversal thereof the said court in which said action was pending, and thereafter the said district court in and for the county of Humboldt, to which said action was transferred, denied and overruled plaintiff's motion to be reinstated and restored to the possession of said premises, from which he had been ejected by the erroneous judgment of said court in said action. Denies that said defendant has, since the summer of 1868, at all times resided upon the land described in the complaint, with his family or otherwise, or that during all of said time defendant has not had any other home for himself or his family. On the contrary thereof, plaintiff avers that during the month of July, 1869, defendant removed from said land, and that his family did not return thereto until
17 the month of October, 1871, and the defendant did not return thereto until the month of December, 1871; that in the month of April, 1872, the defendant and his family removed their residence from said land and did not return to said land until the month of August, 1874; that in the month of October, 1874, plaintiff and his family again removed from said land and did not return thereto until the month of March, 1875. Said plaintiff denies that he did not at any time improve said land, or that he did not own a dwelling-house on said land, and plaintiff admits that he has not actually and in person resided upon said land since May 5th, 1868, but avers that it was for the reason that he could not, as advised, without being in contempt of court, and denies that he has never reduced any portion of said land to his possession, and denies that he procured the possession of any improvements on said land by fraud upon defendant or any other person.

Plaintiff admits that on or about August 13th, 1866, he filed with the recorder of Klamath county, State of California, for record, a paper defining the boundaries of land which he then intended to claim as a pre-emption; but plaintiff denies that in any declaratory statement filed by him with the register of the United States land office for Humboldt land district, he ever claimed any land other than that described in the complaint; and in this behalf plaintiff avers that long before May 5th, 1868, to wit, since on or about July

26th, 1867, defendant had actual notice that plaintiff intended to enter the land described in the complaint under and by virtue
18 of the pre-emption laws of the United States. Said plaintiff denies that in 1868, or any other time, he ever abandoned all or any portion of the land described in the complaint, or his right or claim to pre-empt the same.

Said plaintiff denies that the defendant, before the register and receiver of the United States land office for Humboldt land district, on the trial before said officers between plaintiff and defendant as to their respective rights to pre-empt the land described in the complaint, proved by competent evidence, or at all, all the matters and things alleged in defendant's answer and cross-complaint, as to defendant's right to pre-empt the same, or as to the failure of plaintiff to comply with the requirements of the law as to inhabitancy and improvement of said land, to the satisfaction of the said register and receiver, or that the said register and receiver found the said matters so alleged in said answer and cross-complaint to be true; but, on the contrary thereof, plaintiff alleges that the defendant failed upon said trial to prove to the satisfaction of said register and receiver that he, defendant, had resided upon said land for any longer or different manner or at any other times than as hereinbefore alleged, or that plaintiff had not fully complied with the requirements of the pre-emption law as regards residence and intent in good faith to comply with such law, and plaintiff avers that the said register and receiver did not find any further or different facts than is contained in their decision upon the rights of the parties hereto in said contest, a true copy of which decisions is fully set out in the
19 next succeeding separate defense in this answer contained, and is here referred to and made a part of this defense, as if the same were here recited at length.

Said plaintiff denies that the register or receiver or the Commissioner of the General Land Office, or the Acting Secretary of the Interior, by mistake, or otherwise, or at all, found that any writ of execution issuing out of said district court in said action of Bohall *vs.* Dilla had been since May, 1868, in full force, or in force at all after the execution thereof, or that the finding of either or all of said officers, that plaintiff, after his ejectment therefrom by the judgment of said district court, could not have gone upon said land without being in contempt of said court, was made by mistake.

Denies that the said receiver of the United States land office at Humboldt, erroneously or by mistake of law, upon the facts alleged in defendant's cross-complaint, or upon the facts actually found by said officer, erroneously found as a conclusion of law that plaintiff was entitled to the land described in the complaint.

Plaintiff admits that the decision of the register and receiver of the United States land office at Humboldt, as to the respective rights of plaintiff and defendant to pre-empt the land described in the complaint, was reviewed and considered by the Commissioner of the General Land Office, but denies that such review and consideration was made upon any other evidence than that submitted to and passed upon by said register and receiver; and denies that any ad-

dition or *ex parte* affidavits or evidence was sent to the said Commissioner by plaintiff, or any one in his behalf, or at all, or that said Commissioner erroneously, or otherwise, or by mistake of law, in addition to the evidence taken at said contest between said parties, and the decision of said register and receiver considered *ex parte* evidence, sent him by plaintiff, or by any one in his behalf; and denies that said Commissioner considered any *ex parte* evidence of any kind or character, or that the decision of said Commissioner in said contest, was based upon *ex parte* evidence of any character, or that any *ex parte* evidence was ever received by him therein.

Admits that said Commissioner found as a fact that plaintiff was unable to make an actual residence upon the land described in the complaint after May 8th, 1868, without being in contempt of said district court, but denies that the same was untrue either in law or in fact, or that in making the same the said Commissioner received or considered any *ex parte* evidence, or affidavits, or any other than legal and competent testimony, submitted at the trial of said contest to the register and receiver.

Admits that the said Commissioner found as a fact that the said defendant had not complied with the requirements of the pre-emption laws as regards the residence upon said land, but denies that the same was untrue either in law or fact, or that in making the same the said Commissioner received or considered any *ex parte* evidence of any kind or character, or any other than legal and competent evidence submitted at the trial of said contest before the said register and receiver.

21 Admits that the said Commissioner of the General Land Office therein adjudged that the plaintiff was entitled to pre-empt the land described in the complaint, *but denies* that the same was made by mistake of law, or by wrong conclusions of law from the facts alleged in defendant's cross-complaint, or by mistake of law, or wrong conclusions of law from the facts actually found by said Commissioner; and in this behalf plaintiff avers that said decision was based alone upon the facts found by said Commissioner, and recited in his said decision, a true copy of which decision is fully set out in the next succeeding separate defense in this answer contained, and is here referred to and made a part of this defense as is the same were here recited at length. And plaintiff avers that the facts so found by said Commissioner are other and different from those alleged to have been found by him in defendant's answer and cross-complaint.

Plaintiff admits that thereafter the Acting Secretary of the Interior decided that this plaintiff *was* entitled to pre-empt the land described in the complaint, and that defendant *was not* so entitled, but denies that the same was based upon the facts alleged by said defendant to have been found by the register and receiver, or that said decision was based upon any other or different facts than are recited and referred to in said decision, which facts are other and different than those stated to have been found in defendant's answer and cross-complaint. A true copy of said decision is fully set out

in the next succeeding separate defense in this answer contained, and is here referred to and made a part of this defense, as if the same were here recited at length, and plaintiff denies that
22 said decision was made by mistake of law, or wrong conclusion of law from any facts admitted, proved, or found, or that the same was made without any power or authority vested in said Acting Secretary to make said decision.

And for a further and separate answer and defense to defendant's "further and separate answer and cross-complaint," the plaintiff alleges, that heretofore, to wit, on or about the 25th day of March, A. D. 1875, in an action then pending before the register and receiver of the United States land office, in and for Humbold land district, in the State of California, in which land district the land described in the complaint was then and is now situate, wherein this plaintiff, D. N. Dilla, and said defendant, Walter Bohall, were parties, and the only parties, and between whom in said action there was a question as to their respective rights to pre-empt the land described in the complaint, such proceedings were had therein that thereafter, to wit, on the 24th day of August, 1875, the said register and receiver duly gave and rendered the following judgment and finding of facts, to wit:

"Walter Bohall filed D. S. No. 1292, October 3, 1873, alleging settlement October 22d, 1862, claiming the S. W. ¼ of Sec. 29, T. 7 N., R. 1 E., H. M.

"D. N. Dilla filed D. S. No. 1555, December 26th, 1873, alleging settlement March 25th, 1865, claiming the same land, S. W. ¼ of Sec. 29, T. 7 N., R. 1 E., H. M. Township plat filed October 2d, 1873. Both claimants are qualified pre-emptors, and both filed in
23 time. The testimony in this case shows that Walter Bohall purchased from his brother, Wm. M. Bohall, a possessory claim of a tract of unsurveyed land and improvements thereon, by deed October 27th, 1862, embracing the land in contest without material difference in exterior boundaries; the improvements at that time consisting of a small dwelling-house, a small barn, and two fields, fenced, and some land broke and under cultivation. The tract appears to have been left in the care of Wm. M. Bohall, and was unoccupied until 1864, when a Mr. Halsey occupied it with Walter Bohall's consent. Within this period Bohall claims to have had stock running on that and other lands, with cattle of other parties, the fences being partially down. In March, 1865, Walter Bohall made an agreement, signed by himself only, to sell the place to D. N. Dilla on condition of a partial payment made and other partial payments to be made, according to specifications, whereupon Dilla went upon the land to reside upon and cultivate it, and remained and made his home upon the land until May 5th, 1868, when he was ejected from the land, and Walter Bohall, by his agent, Wm. M. Bohall, was put in possession by the county sheriff, in execution of an order of the 8th judicial district court, which order has never been vacated. Said order resulted from a suit brought in said court in 1866 by Walter Bohall to enforce a compliance with the agreement by Dilla or restitution of the property, the history of

which shows several trials and appeals, the last trial (in 1874) resulting in favor of Bohall, is still subject to appeal, and from
24 which Dilla testifies he intends to appeal. During the time of Dilla's residence upon the land he repaired the house and built an addition thereto, built fence, prepared a foundation and timber for a barn, built a water-wheel, set out an orchard, cleared and broke new land, and cultivated thirty to forty acres of land, raising crops annually. During a continuance of this case Dilla returned to the land in contest and partially erected a small house, and remained in it one night. It is shown that Walter Bohall first made personal settlement on the land in contest two or three months after Dilla's ejectment, May 5th, 1868, and remained with his family residing upon and cultivating the land ten months. He then moved to Eureka, twenty miles distant (about May or June, 1869), his family returning October 15th, 1871, and himself rejoining his family December 23d, 1871, and remained on the place till April 25th, 1872. He then removed to Mattole (about eighty miles) with his family to administer upon his father-in-law's estate, and returned to the place in contest in August, 1874. October 13th, 1874, he, with his family, removed to Arcata, as he says, 'to get my children to school and find work for myself, as I was out of means, and could earn none on the place during the winter,' and returned on the 11th of March to the place, and was residing there with his family at the time of this contest. During the time Bohall has been absent from the premises, since Dilla's ejectment, they have been occupied by his tenants. When he has resided upon the premises he has cultivated the land and added to the improvements by erecting a barn, digging a ditch, setting a water-wheel
25 and some threshing machinery, removing, rebuilding, and repairing fences and otherwise. Dilla is the prior actual settler; there is no question of his constant residence upon, cultivation, and improvement of the land claimed from March, 1865, to May, 1868. It is our opinion that these acts of Dilla gave him a right of pre-emption, and that at the time of Dilla's ejectment Bohall had acquired no pre-emption right to the land, and that any right of pre-emption which Bohall has acquired has its origin subsequent to that date. It is also our opinion that Dilla has not forfeited his right to pre-empt the land claimed by reason of his absence from the land since his ejectment. His leaving the land was not a voluntary act, but by compulsion under an order of the eighth judicial district court, which he was not at liberty to resist. Also, there is testimony showing grounds of apprehension of personal danger, and it is uncertain when this ground of apprehension ceased, if at all. It is our opinion that any agreement not in conflict with the pre-emption laws of Dilla with Bohall to obtain his, Bohall's, consent for Dilla to go upon the land, made in good faith or otherwise, is not a question for our consideration, or one that can affect the right of Dilla to make settlement upon public land as a pre-emptor. It does not appear that Bohall had any right to concede or withhold, which comes within the purview of the pre-emption laws. His occupancy of public land by grazing cattle, and owning improvements

thereon, without making personal settlement on the land, is, in the pur-
view of the pre-emption laws, by sufferance only, until a quali-
26 fied pre-emptor, by initiating a right under the pre emption
laws, claims the land. Exhibit C purports to be a copy of a paper filed for record by Dilla in the office of the county clerk of Klamath (now Humboldt) county, defining his pre-emption claim so as to embrace forty acres not within his present claim, and to exclude forty acres embraced in his present claim. It was recorded August 13th, 1866, and shows ostensibly the land he then claimed as a pre-emption. He was, however, at liberty to change his intention and relocate his claim so long as the adjoining public land which he might select was free from adverse claim. On the 26th of July, 1867, in his answer in the 8th judicial district court, (Exhibit F,) he avers that he claims as a homestead and pre-emption claim the land therein and herein in contest, and all his acts thereafter are in accordance with such averment. It is our opinion that at the time of his ejectment, and prior thereto, Dilla claimed as a pre-emption the land embraced in his D. S. No. 1555. *Prima facie* Dilla owned a house on the land he claims up to the time of his ejectment. There was a house on the land in his possession, which served him as a dwelling. Another house was unnecessary. By the judgment of the court, and by possession, the house and other improvements are Bohall's, said judgment being still subject to appeal. The house partially erected by Dilla was built at his peril and against the order of the court, and it is our opinion that he has not been at liberty to build a house of his own on his claim since his ejectment, and that
he cannot be held in default for not having a house and cul-
27 tivation and present residence upon the land so long as he
cannot go upon the land for these purposes without resisting an order of the district court, and that, therefore, the land should be awarded to Dilla.

"SOLOMON COOPER, *Receiver.*"

"I dissent from the foregoing opinion of the receiver in the following particulars: 1st. The house and other improvements on the land in March, 1865, were Bohall's by purchase, consideration $250, and the district court has decided the so-called contract to be fraudulent and void, therefore Bohall is, and has been, the sole lawful owner of said house and improvements from the time of his purchase, together with the repairs and additions thereto, which have been awarded to him by the decree of the 8th judicial district court of California, and which decision is, in my opinion, binding upon this office as to the ownership of said improvements. 2d. That since restitution of the possession of the premises to Bohall he has made actual settlement and resided upon and cultivated the land at intervals during the last seven years, and is at present time of hearing residing upon the land with his family, thus complying with the pre-emption law. 3d. That 'Exhibit C' shows that Dilla, by his own notice of public record, August 13th, 1866, then claimed land as a pre-emption other than that embraced in his D. S. Said public notice of pre-emption claim by Dilla remained uncancelled at the

time Bohall made actual settlement on the land he claims in
28 1868, and by said notice the S. W. forty of the land in contest formed no part of the claim of Dilla, and was open to settlement by Bohall. 4th. By said notice Dilla claimed forty acres adjoining the tract in contest, from which he was not ejected, and upon which he might have remained, and an abandonment of said forty by Dilla continued over six years, is, in my opinion, an abandonment of his claim. It is my opinion, therefore, that the land should be awarded to Bohall.

"C. F. ROBERTS, *Register.*"

That thereafter the said contest between the plaintiff and defendant, as to their respective rights to pre-empt the land in the complaint described, came regularly before the Commissioner of the General Land Office for his adjudication and decision, and the said Commissioner did thereupon and therein, on the 6th day of January, A. D. 1876, duly make and render the following judgment, decision, and findings of fact, to wit:

"DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
"WASHINGTON, D. C., *Jan.* 6, 1876.

"REGISTER AND RECEIVER, *Humboldt Cal.:*

"GENTLEMEN: The testimony in the contested case of D. N. Dilla *vs.* Walter Bohall, involving title to the S. W. qr. of 29, 7 N., 1 E., H. M., has been received and considered. Land surveyed in 1873, and plat filed in your office October 2d, same year. D. N. Dilla filed D. S. 1555, December 26th, 1873, alleging settlement March 25th, 1865, and claiming above land. Walter Bohall filed D. S.
29 1292, October 3d, 1873, alleging settlement October 22d, 1862, and claiming same land. Trial commenced at your office March 25th, and concluded April 14th, 1875. From the testimony now submitted, it appears that in October, 1862, Walter Bohall purchased from his brother, William M. Bohall, the possessory claim to a tract of land, together with the improvements thereon, consisting of a small house, barn, fencing, and some cultivation, the boundaries of which are nearly the same as that in dispute. Walter Bohall does not appear to have occupied the land at this time. In March, 1865, he made an agreement with D. N. Dilla to sell the place to him in consideration of certain money to be paid down (fifty dollars), and certain other payments to be made subsequently. This agreement was only signed by Bohall. The fifty dollars were paid by Dilla, and he was put into possession of the premises by Bohall. Dilla repaired the house, laid the foundation for a barn, set out a large number of fruit trees and vines, ploughed and cultivated between thirty and forty acres of the land, and resided there continuously until May, 1868, when he was ejected therefrom by the sheriff, in pursuance of an order issuing out of the 8th judicial district court, on a judgment obtained by Bohall in a suit against the said Dilla to enforce the terms of the agreement before referred to. The final issue of this matter is still undetermined, there being now an appeal pending to the supreme court of the State. At the time of the ejectment of Dilla, W.

M. Bohall was put in possession as the agent of Walter Bohall. Two or three months after this Walter Bohall moved on the land and remained there about ten months. In June or July, 1869, he removed to Arcata, about twenty miles distant. In October, 1871, his family moved back on the land; he returned in December following. They remained there until April, 1872, when they moved to Mattole, about eighty miles distant. Here he staid until August, 1874, when he returned and remained on the land until October following, when he again moved to Arcata, living there until after the initiation of the present case, when he returned to the land, where he was living at the time of the trial. During his absence, except for a period of two or three months, the land has been occupied by his tenants, one of whom is still there. Since the commencement of the trial, and during a continuance which had been granted, Dilla went upon the land, put up a temporary cabin, and took up his residence there. From the time of his settlement in 1865, until ejected by due process of law in 1868, Dilla fully complied with the law. Since that time he has been unable to make a residence on the land without being in contempt of court. A non-residence in a case of this kind is clearly excusable, and should not be allowed to work against him. Bohall has clearly failed to comply with the law as regards residence. The pre-emption law requires a continuous personal residence. This Bohall has not had, and the residence by his tenants will not operate to cure this defect. Dilla is adjudged entitled to the land, and the filing of Bohall is held for cancellation. Notify the parties in interest of this action, and allow the usual sixty days for appeal.

"Respectfully,

"S. S. BURDETT, *Commissioner.*"

That thereafter the said contest between the plaintiff and defendant, as to their respective rights to pre-empt the land in the complaint described, came regularly before the Secretary of the Interior, on appeal from the decision of the Commissioner of the General Land Office, and thereupon such proceedings were had therein that upon September 26th, 1876, the Acting Secretary of the Interior duly made and rendered the following judgment, decision, and findings of fact, to wit:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, D. C., *Sept.* 26, 1876.

"SIR: I have considered the case of D. N. Dilla *vs.* Walter Bohall, involving the right to the S. W. ¼ of Sec. 29, township 7 north, range 1 E., Humboldt meridian, Humboldt, California, on appeal from your decision of January 6th, 1876, awarding the land to Dilla. Your recital of the facts in the case in all material particulars appears to be correct. Since your action the decision of the district court has been affirmed by the supreme court of California. Counsel for Bohall urge that effect should be given to this decision of the court. A compliance with this request would result in the rejection of a claim made under the pre-emption law, on account of

fraud, as found by the court, and a failure to comply with the terms of a contract made between said claimant and his alleged grantor, the defendant in this case. In other words, as the court adjudged that Dilla came into possession of the land by fraud, and was adjudged to have no legal right to the same, and was ejected by order of said court, he should not be
32 recognized as possessing a valid pre-emption claim as against Bohall. As stated, the evidence shows that Dilla was put in peaceful possession of the premises by Bohall in March, 1865; that he resided thereon and improved and cultivated the same until ejected by order of the court in May, 1868. He has complied with the requirements of the pre-emption law. In 1865 the tract was a portion of the public domain of the United States, and the only right Bohall had to the same was a possessory right, which could only be maintained under the pre-emption law by means of a personal residence and possession. Dilla cannot be recognized as a tenant of Bohall, or as holding for him, as such a relation is not recognized by the pre-emption law. To be governed by the judgment of the court, rejecting the right of Dilla to the land, would be, in effect, to recognize its right to dispose of a claim to the public land of the United States. The State of California was admitted into the Union upon the express condition that the people of said State, through their Legislature or otherwise, should never interfere with the primary disposal of the public lands within its limits. Hence, any action of her courts to this effect cannot be recognized by this Department. Dilla's claim is based upon the ground of pre-emption. He obtained peaceable possession of the premises, and has complied with the law in the matter of settlement and residence, and it is not for this Department to enquire whether the terms of the contract between himself and Bohall have been complied with, or to enquire by what means that contract
33 was made. The reason assigned by Dilla for his failure to occupy the land since his ejectment therefrom must be recognized as valid, as it would be absurd to require of him an act which would place him in contempt of court. If, under this rule, the judgment of the court operates in his favor, it is a matter which, in the absence of legislation by which such a state of affairs might be avoided, that this Department is powerless to regulate. Dilla should be allowed to make payment for the land. Your decision is affirmed, and the papers transmitted with your letter of July 21st, 1876, are herewith returned.

"Very respectfully,

"CHARLES T. GORHAM,

"*Acting Secretary.*

"To the COMMISSIONER OF THE GENERAL LAND OFFICE."

And plaintiff avers that in the said action, contest, and trial between the plaintiff and defendant, there was involved the question as to which of said parties was entitled to pre-empt the said land under the laws of the United States, and, on the trial thereof before the said register and receiver, and on appeal therefrom to the Com-

missioner of the General Land Office, and from the decision of said Commissioner to the Secretary of the Interior, all the matters set forth in defendant's answer and cross-complaint, and charged as fraud upon the part of the plaintiff, and as to the manner in which plaintiff obtained possession of said land from defendant, and as to the qualifications and right of defendant to pre-empt the same,
34 and as to the alleged compliance by defendant with the laws of the United States relating to pre-emption claims, and as to plaintiff's alleged failure to comply with said laws, and all the matters and things alleged in defendant's said answer and cross-complaint, as to the respective rights of the plaintiff and defendant to the land described in the complaint, were upon said trial, action, and contest, before each and all of said land officers of the United States in issue, and the subject of inquiry and controversy, and that in said action, trial, and contest before said officers the Acting Secretary of the Interior, rendering the judgment and decision on appeal of said action to the Secretary of the Interior, judgment was duly rendered therein that this plaintiff was a qualified pre-emptor, and that as such he was entitled to enter, pay for, and receive a patent from the Government of the United States for the land described in the complaint. And it was further adjudged in said action, contest, and trial that the said defendant had *not* complied with the pre-emption laws of the United States, and was *not* entitled to enter, pay for, or receive from the Government of the United States a patent for the land described in the complaint, or for any part thereof.

Plaintiff alleges that *all* the issues in the said action, trial, and contest before said officers were and are the same issues in controversy herein, and alleged in defendant's answer and cross-complaint, and upon said issues judgment has been duly rendered in favor of this plaintiff and against the said defendant by the said land officers of the United States, as aforesaid. That in pur-
35 suance of the said judgment of the said officers of the United States, and upon making final proof and payment for said land as required by law, the said land was granted and sold to the plaintiff by the Government of the United States of America by letters patent issued and delivered to plaintiff before the commencement of this action.

And plaintiff avers that in the said action in the district court of the 8th judicial district of the State of California in and for the county of Klamath, wherein the said defendant, Walter Bohall, was plaintiff, and the plaintiff herein was defendant, referred to in defendant's cross-complaint, and in the same action transferred to said 8th judicial district court in and for the county of Humboldt, in which said action final judgment was rendered that said Bohall should have and recover from plaintiff the possession of the premises described in the complaint as alleged in said cross-complaint, nor upon any of the trials of said action, therein referred to, was the right of plaintiff to hold the possession of said land, as a pre-emptor under the laws of the United States, in issue or passed upon by the judgment of said court. Plaintiff avers that at the date of the ren-

dition of said final judgment in said action, and at the time of its affirmance by the said supreme court of the State of California, the plaintiff had not acquired the title to said land from the United States. That subsequently to the time of the rendition of the judgment of the said district court referred to in said cross-complaint, and after the affirmance of said judgment by the said supreme court, the plaintiff has acquired the title to the land described in
36 the complaint from the United States of America, and his right to acquire and hold such title was not in issue before said district court upon any of the trials of said action, nor was the same adjudicated or in any manner passed upon in said actions.

CHAMBERLIN & DEHAVEN AND
J. F. STECK,
Attorneys for Plaintiff.

Duly verified.

(Endorsed:) Answer to cross-complaint. Filed October 16th, 1877. Wm. J. McKenna, clerk, by John Miller, deputy.

Findings of Court.

[Title of Court and Cause.]

Said action came on regularly for trial before said court, on the 20th day of December, 1877, at a regular term thereof, and after hearing and examining the evidence adduced by the parties hereto the court finds the following

Facts:

1st. At all the times hereinafter mentioned defendant was, and still is, a citizen of the United States, over the age of twenty-one years, and the head of a family.

37 2d. On October 27th, 1862, defendant purchased the possessory right to and improvements upon the land in the complaint herein described, and received a good and valid deed therefor from Wm. M. Bohall.

3d. Said land was at the time unsurveyed, belonging to the United States, and was open and subject to pre-emption settlement.

4th. That the improvements upon said land at the time defendant purchased them, as aforesaid, consisted of a dwelling-house one and one-half stories high, sixteen feet by twenty-four, and kitchen on one end sixteen feet by twelve; a milk-house ten square feet, a granary, barn, and a mile and one-half of fencing—principally rails; a small orchard, and twenty-five or thirty acres of land under cultivation.

5th. That immediately after said purchase, defendant entered upon and into possession of said land, and continued to hold and possess the same until March, 1865, at which date plaintiff obtained possession thereof in the manner and by the means hereinafter set forth.

6th. That during said time between October, 1862, and March, 1865, defendant held said land, intending in good faith to comply

with the requirements of the pre-emption laws of the United States; that an Indian war was at that time raging in the country about said land, which rendered it wholly unsafe for any family to reside upon said land.

7th. That on March 23d, 1865, plaintiff wrote and induced defendant to sign a written paper, of which a copy follows: "Contract of Sale of Real Estate; Eureka, Humboldt county, Cali-
38 fornia: This contract is concluded and perfected this day between Walter Bohall, party of the first part, and D. N. Dilla, party of the second part, both of the place aforesaid. Walter Bohall, for and in consideration of the following payments, made to him or assigns, by the party of the second part, or his assigns—the sum of six hundred dollars, fifty dollars of which is this day received and is hereby acknowledged; one hundred dollars on the first of August next, use at one per cent. per month until paid, and four hundred and fifty dollars the first of April, 1866, with a continuance of time of payment, if needed, on last-mentioned amount, six months, and use at ten per cent. per annum—covenants to convey to the party of the second part, his heirs or assigns, all the following-described quarter section of land in Klamath county, California, being on the south end of a tract of land known as Dow's Prairie: Commencing at the southeast corner of Wm. Underwood's claim on said prairie, from thence south one-half mile, thence east one-half mile, thence north one-half mile, thence west one-half mile to the place of beginning, together with all the tenements, hereditaments, and appurtenances thereto belonging or in any wise appertaining.

"In witness whereof, I have hereunto set my hand and seal.

[SEAL.] "WALTER BOHALL."

That the land described in the paper, of which the foregoing is a copy, is the same land in controversy herein; that in order to induce defendant to sign said paper, plaintiff then and there ver-
39 bally agreed to and with defendant to pay him the several sums of money at the dates as in said written paper is expressed, by means whereof he induced defendant to sign said paper, and put him in possession of said land and improvements; that plaintiff did not accept the terms of said offer in good faith, and plaintiff did not at any time intend to comply with the terms thereof, and defendant was induced to sign said written paper by said false representations of plaintiff, without which defendant would not have signed the same.

8th. That after getting from defendant the possession of said land and improvements in the manner as aforesaid, plaintiff denied that defendant ever had any right or title to said land or improvements; also denied that he (plaintiff) had agreed to comply with the conditions or terms of said written paper, or that he was bound by any condition in said written paper contained.

9th. That on September 7th, 1866, defendant commenced an action in said eighth judicial district court in and for the county of Klamath, State of California, against plaintiff herein, to recover the possession of said land and improvements from plaintiff; that

the parties to said action were the same parties, and no other, than the parties to this action that such proceedings were had in said last-mentioned action that on the 20th day of April, 1868, judgment was duly given to the effect that defendant herein should have and recover of and from plaintiff herein the possession of said land and premises; that thereafter, and while said judgment was in full force and effect, and unreversed, a writ of execution,
40 duly tested, was duly issued from said last-named court upon, and in pursuance of, said judgment, addressed and delivered to the sheriff of said Klamath county, whereby said sheriff was commanded to place defendant herein in the quiet and peaceable possession of said land and premises in said judgment and writ of execution described, being the same land in controversy herein; that under and by virtue of said writ of execution said sheriff did, on the 5th day of May, 1868, put defendant into the possession of the lands and premises in said writ and in the complaint herein described, and from thence hitherto defendant has been, and still is, in the quiet and peaceable possession of said land, and a resident thereof, as specified in finding No. 10; that on the 11th day of July, 1871, said last-named judgment was reversed by the supreme court of the State of California, on appeal thereto, and a new trial ordered; that said judgment remained reversed, as aforesaid, till September 20th, 1873, a period of two years and two months; that during said last-named period plaintiff, made a motion in said court in said case to be reinstated in the possession of said land, which said motion was, by said court, denied; that on said last-named date, and as the result of a new trial in said last-named action, judgment was duly given by said court that said Walter Bohall, defendant herein, have restitution and possession of said real estates and premises; that on the 13th day of August, 1874, said last-named judgment was reversed by the supreme court of the State of California on appeal thereto, and a new
41 trial ordered; that said judgment remained reversed, as aforesaid till December 15th, 1874. That on the 26th day of September, 1874, plaintiff made a motion in said last named action before said court for an order reinstating plaintiff herein in the possession of said land, which motion was by said court denied. That during all of the times that said judgment was reversed, as aforesaid, plaintiff herein made no effort whatever to make any settlement or residence upon any portion of the land in controversy herein, nor to erect a dwelling house or any other improvement upon said land. That on or about December, 1874, a new trial was had in said last-named action before said court, a jury having been waived by the parties, and as a result of said last-named trial the court found as facts: "That said defendant, Walter Bohall, on the 23d day of March, 1865, made and delivered to defendant the written paper (a true copy of which is set out in the foregoing 7th finding) and which is hereby referred to and made a part hereof; that D. N. Dilla, plaintiff herein, verbally agreed to and with said Bohall to comply with the terms of said written paper or offer, and gave said Bohall fifty dollars for the purpose of getting

into the possession of said land and premises, and that said Bohall believing said Dilla was acting honestly and in good faith in the matter, put said Dilla into possession of said premises; but said Dilla never accepted said written offer in good faith, and never intended to comply with its terms, and that said Bohall was induced to sign said written offer by the false and fraudulent representations and practices of said Dilla; that said Dilla denied that said Bo-
42 hall ever had any right or title to said land, to sell to said Dilla, or that he, said Dilla, ever agreed to comply with the terms of said written offer, or that he was bound by its terms." That said facts so as aforesaid found by said court, in said last-named action, were material to the issues tried therein. That on December 15th, 1874, judgment was duly given in said last-named action by the court upon said and other facts therein found to the effect that said Bohall should have and recover from said Dilla the possession of said land and premises, which last-named judgment has since been affirmed by the supreme court of the State of California, and from its date has been and still is in full force and effect.

10th. That on July 5th, 1868, defendant settled upon the land in controversy with his family, with intent to pre-empt the same. That in the latter part of 1869, defendant moved his family to Eureka in order to procure employment for himself, and obtain means with which to improve the land in controversy; that such removal from the land by defendant was only temporary, and with no intent of abandoning his residence thereon, and defendant returned with his family to his home upon said land in the fall of 1871. That during such temporary absence from said land, defendant expended in improvements upon said land about seven hundred dollars in gold coin. That in the spring of 1872, defendant removed his family from the land in controversy, in order to enable him as administrator of the estate of his wife's father to settle up said estate. That such removal by defendant from the land in controversy was only temporary, and in order to enable defendant
43 to perform a specific duty, and with no intent of abandoning his residence upon the said land; that as soon as defendant had settled up said estate he immediately, and on or about August, 1874, removed his family back upon the land in controversy; that during the winter of 1874 defendant removed his family into the town of Arcata for the purpose of enabling him to send his children to school, and also that he might be able to earn money, as he could do nothing upon said land during the winter; that early in the spring of 1875, and as soon as the winter was over, defendant removed his family back upon the land in controversy, and has from thence resided with his family personally upon said land; that during the temporary absences of defendant from the said land since 1868, as aforesaid, he has had different persons employed to care for and protect the improvements upon the land in controversy, but did not at any of said times lease said land, or any part thereof, or the improvements thereon, to any person or party; that since May 5th, 1868, defendant has settled and resided upon said land with his family, with intent to comply with the requirements of the laws of

the United States, commonly called the pre-emption laws, and to pre-empt the same in good faith, and from thence hitherto defendant has not had or owned any other home for himself or family, and during said residence as aforesaid of defendant upon said land he has cultivated the same and made extensive and valuable improvements thereon, all the time relying upon his right to acquire
44 title to the same from the United States by and through its so-called pre-emption laws; that defendant was not at any of such times, nor is he now, the owner of three hundred and twenty acres of land in any State or Territory; that defendant did not at any time quit nor abandon his residence on his own land to reside on said land.

11th. That plaintiff herein did not at any time erect or own a dwelling-house upon said land, nor has he ever resided upon or had any possession of any part of said land, except from about March, 1865, to May, 1868, during which time he occupied the dwelling-house and improvements of defendant herein; that on August 13th, 1866, plaintiff claimed as a homestead, by his notice duly recorded, forty acres not included in the land in controversy herein, which record remained uncancelled at the time defendant made his settlement upon said land, in 1868; that by said notice said Dilla claimed forty acres adjoining the land in controversy herein, from which he was not ejected by said or any writ of execution, nor at all, which he might have settled upon and improved and resided upon, which said Dilla voluntarily abandoned in 1868, and has never occupied or improved or resided upon any portion of any of said lands since.

12th. That on October 2d, 1873, said township seven north, range one east, Humboldt meridian, was duly surveyed, and on that date the approved plat thereof was duly filed in the proper register's office, in Humboldt land district, State of California; that on the 3d day of October, 1873, defendant duly filed in said register's office his declaratory statement in writing, as required by law, wherein
45 he set forth and declared his intention to claim the S. W. quarter of Sec. 29, in said T. 7 N., R. 1 E., H. M.; that he was a citizen of the United States, over twenty-one years of age, and the head of a family, and that he had settled upon said land upon October 22d, 1862.

13th. That thereafter, in March, 1875, defendant was cited to appear at the United States land office in Humboldt land district, in Humboldt county, State of California, and before the register and receiver thereof to contest the right of plaintiff to pre-empt said land in the complaint herein described, and in obedience to said citation defendant appeared before said officers of said land office in March, 1875, and plaintiff appeared at the said time and place, and a contest was then and there had before said register and receiver, between plaintiff and defendant, as to their respective rights to pre-empt said land, and at said contest, and upon the trial thereof defendant proved, by competent evidence, all the facts herein above in these findings stated, to the satisfaction of said register and receiver, and said register and receiver found all of said matters and things to be

true, and that defendant was entitled to pre-empt said land unless plaintiff had the better right.

14th. That upon said facts said register awarded said land to defendant herein, and said receiver erroneously and by mistake of law, and upon said facts, awarded said land to plaintiff herein, which decision and award is hereby referred to and made a part hereof.

15th. That said decision of said register and receiver were afterwards reviewed by the Commissioner of the General Land
46 Office upon a written report of the evidence adduced by said parties before said register and receiver; and upon such review of said decisions by said Commissioner, so as aforesaid, and thereupon, on January 6th, 1876, said Commissioner erroneously and by mistake of law found as a fact that since 1868 said Dilla has been unable to make a residence upon the land in controversy without being in contempt of said district court, and also that said Bohall had failed to comply with the requirements of the pre-emption law as regards residence, in that defendant had not continually resided upon said land from May, 1868, till April, 1875.

Said Commissioner also found as a fact that during the said contest between plaintiff and defendant, "and during a continuance which had been granted, Dilla went upon the land, put up a temporary cabin, and took up his residence there," which finding was false in fact, and not based upon evidence given; and thereupon said Commissioner, by mistake of law, adjudged that said Dilla was entitled to pre-empt said land, which judgment and decision is hereby referred to and made a part hereof.

16th. That thereafter, and upon appeal duly taken to the Secretary of the Interior, one Charles T. Gorham, Acting Secretary of the Interior, on September 26th, 1876, reviewed all the evidence and decisions in said contest, and found the same facts, so as aforesaid found by said register and receiver, and thereupon said Gorham, by mistake of law, adjudged that said Dilla should be allowed to pre-empt said land. Said decision of said Acting Secretary of the Interior is hereby referred to and made a part hereof.

47 17th. That on December 29th, 1876, defendant offered to said register and receiver, at said land office, to prove to them all the foregoing facts recited in findings herein numbered 1st, 10th, 11th, 12th, and the additional fact of continual residence up to said last-named date by him, and to enter and pay for said land, and tendered the sum of two hundred dollars to said receiver, and the legal fees of said officers therefor, but said officers refused to allow defendant to make said or any proof to enable him to pre-empt said land or to pay for the same.

18th. That on January 6th, 1877, plaintiff was allowed by said register and receiver to pre-empt and pay for said land, and thereupon and on the 14th day of April, 1877, a patent for said land was made and delivered to said plaintiff, passing to him the legal title of the United States.

From the foregoing facts and the additional facts found in response to the issues submitted by the plaintiff and hereto attached, the court finds the following

Conclusions of Law.

I.

That in adjudging that plaintiff had the better right or any right to pre-empt the land in the complaint herein described, the receiver and Commissioner and Acting Secretary of the Interior made a mistake of law, and in refusing to permit defendant to pre-empt and pay for said land, said last-named officers also made a mistake of law.

48 II.

That plaintiff holds the naked legal title to said land in trust for defendant.

III.

That defendant is entitled to a decree of this court, ordering and adjudging that plaintiff shall, by good and sufficient deed convey said land to defendant; that if plaintiff fail or refuse to make such deed within twenty days after the making and entry of said decree, then the clerk of this court shall, in the name of and for plaintiff, execute and deliver to this defendant a good and sufficient conveyance of said land, and until such conveyance be executed that such decree shall stand for and operate as a conveyance to defendant of said premises.

It is ordered that decree be entered in accordance with these conclusions.

J. P. HAYNES,
Judge 8th Judicial District.

[Title of Court and Cause.]

In response to the request of plaintiff that the court file findings of fact in answer to certain questions therein propounded, the court finds as follows:

1st. That plaintiff, at the time mentioned in the complaint, had pre-empted and paid for the land described, and thereafter,
49 on the 14th day of April, 1877, a patent was issued to him for the same, passing to him the legal title of the United States.

2d. After the reversal of the judgment of this court, referred to in the defendant's answer and cross-complaint, plaintiff made application to said court to be restored to the possession of the land in controversy, and said applications were denied.

3d. It is true that in the month of July, 1869, defendant removed from said land, and his family did not return thereto until October, 1871, nor the defendant himself until December following; that in the month of April, 1872, the defendant and his family again removed from said land and did not return there until August, 1874, and that in October, 1874, defendant and his family again removed from said land and did not return thereto until March, 1875, as more specifically stated in finding No. 10.

4th. Plaintiff did not, at any time, intend to abandon his residence upon and pre-emption right to the land in controversy.

5th. Plaintiff did not in any declaratory statement, filed in the United States land office, ever claim as a pre-emption any land other than that described in the complaint.

6th. The defendant, before the month of May, 1868, had notice that plaintiff intended to claim as a pre-emption the land in controversy herein.

7th. The defendant, upon the trial between plaintiff and defendant before the register and receiver of the United States land office, did not prove to the satisfaction of said officers that he had
50 lived upon said land for any longer time, or in a different manner, or at any other times than stated by such officers in their respective decisions in such contest.

8th. The Commissioner of the General Land Office did not receive or consider any *ex parte* evidence or affidavits submitted by plaintiff in his decision of the contest between plaintiff and defendant.

9th. The answer of plaintiff to defendant's answer and cross-complaint sets out fully and truly the respective decisions of the register and receiver of the United States land office at Humboldt, the Commissioner of the General Land Office, and the Acting Secretary of the Interior, in the contest before them, as to the respective rights of plaintiff and defendant to pre-empt the land in controversy, and their respective findings in said controversy.

10th. The Commissioner of the General Land Office did not find as a fact that the defendant was a *bona fide* pre-emptor, nor that when he removed from the land at the times stated in his decision that he did so with the intention of returning, nor that his absence was temporary and without an intention of changing his residence.

11th. In the contest between plaintiff and defendant, before the Land Department, as to their respective rights to pre-empt the land in controversy, the matters set forth in defendant's answer and cross-complaint, and therein charged as fraud upon the part of plaintiff, and as to the manner in which plaintiff obtained possession of said land from defendant, and as to the qualifications and
51 right of defendant to pre-empt the same, and as to the alleged compliance by defendant with the laws of the United States relating to pre-emption rights, and as to plaintiff's alleged failure to comply with said laws, were in issue and subject to controversy.

12th. In said action or contest, judgment was given to the effect that plaintiff was a qualified pre-emptor, and as such that he was entitled to enter, pay for, and receive from the United States a patent for the land in controversy herein.

13th. In said action, or contest, it was adjudged and found that the defendant had not complied with the pre-emption law as regards residence upon the land in controversy, and was not entitled to enter the same under said law.

J. P. HAYNES,
Judge 8th Judicial District.

Endorsed: Findings. Filed March 27th, 1878. Wm. J. McKenna, clerk, by John Miller, deputy.

Judgment.

[Title of Court and Cause.]

Said action, having been heretofore tried by said court, and its findings of facts and conclusions of law therefrom being filed herein.

Now, in conformity therewith, it is by said court ordered, adjudged and decreed: That plaintiff herein holds the patent to him
52 issued by the United States, and the title by it in him vested to the southwest quarter of section twenty-nine in township seven north, range one east, Humboldt meridian, lying in Humboldt county, California, in trust for said defendant.

And it is further ordered, adjudged, and decreed that said plaintiff make, execute, and deliver to the clerk of this court, for the use of said defendant, within twenty days from the date of the entry of this decree, a good and sufficient conveyance, properly acknowledged, to convey to in said defendant all the right, title, and interest vested in plaintiff by said patent, and to said land; and in the event that said plaintiff shall fail to make, execute, and deliver such conveyance as herein directed, within the time herein specified for such purpose, the clerk of this court shall, in the name of and for said plaintiff, make, execute, and deliver to said defendant a good and sufficient conveyance of said land, properly acknowledged; and such conveyance, so made by the clerk of this court, shall have the effect and operate in law to vest in defendant all the right, title, and interest now vested in plaintiff by virtue of said patent to the said land.

It is further ordered, adjudged, and decreed that until such conveyance is executed and delivered plaintiff is hereby absolutely enjoined and prohibited from conveying, except as herein directed, or in any manner alienating or incumbering said land or any part thereof.

And it is further ordered, adjudged, and decreed that defendant recover of and from said plaintiff the sum of twenty-six dol-
53 lars and forty cents for his cost and disbursements herein, and that defendant have execution therefor.

Done in open court, the 27th day of March, 1878.

J. P. HAYNES,
District Judge of 8th Judicial District.

Judgment is therefore entered accordingly, this 27th day of March, 1878.

WM. J. McKENNA, *Clerk*,
By W. C. STEWART, *Deputy.*

Endorsed: Decree of court. Filed March 27th, 1878. Wm. J. McKenna, clerk, by W. C. Stewart, deputy.

In the Supreme Court of the State of California. No. 6184. Additional Term, A. D. 1879.

D. N. DILLA, Appellant, *vs.* WALTER BOHALL, Respondent.

On appeal from the district court of the eighth judicial district in and for the county of Humboldt.

And now at this day this cause being called, and having
54 been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by the court.

By the court.

Filed November 25, 1879.

Syllabus.

DILLA *vs.* BOHALL } No. 6184.

In a contest between two persons claiming the right to enter a tract of land under the pre-emption laws of the United States, the question whether one of the parties continuously resided upon the land from his settlement thereon up to the date of the contest is a question of fact, and the decision of the question by the Land Department is conclusive, and not subject to review by the courts.

It is manifest that the defendant cannot sustain his equitable defense so as to require the plaintiff to convey to him the legal title which was conveyed by the patent issued by the United States to the plaintiff, unless the defendant had the better right to pre-empt the land. In the contest between the parties in the Land Department it was incumbent upon each party to prove the facts upon which he relied, as establishing his claim to the right of pre-emption. Defendant filed his declaratory statement October 3, 1873, alleging settlement October 22, 1862, and the plaintiff filed his declaratory statement December 26, 1873, alleging settlement March 25, 1865.

It was proven that in March, 1865, the plaintiff was in the
55 actual and personal occupation of the land, and so remained until May, 1868, when he was ejected therefrom by virtue of a writ of possession issued upon a judgment rendered in an action brought by Bohall against Dilla in one of the district courts in this State, and Bohall was put into possession of the land. In the contest between the plaintiff and defendant in the Land Department it became necessary for the defendant to prove a continuous personal residence on the land from and after May, 1868. It was proven that he was absent from the land from July, 1869, to December, 1871, and from April, 1872, to August, 1874. There is no doubt that there may be absences from the land upon which a pre-emptor has settled under such circumstances or for such reasons that the absences will be justifiable or excusable; that he may be regarded as having had a continuous personal residence upon the land within the meaning of the

pre-emption law. The question in such case is a question of fact, and the determination of the Land Department is final and conclusive. It is the province of the Land Department to determine whether the reasons for and the facts and circumstances attending the absences of the claimant are such that he will be regarded as having complied with the law requiring his continuous personal residence upon the land, and the decision of the questions is not open to review by the courts. In the contest the decision of that question was adverse to the defendant, and that decision must be held to be conclusive here. The same principles are applicable to the absence of the plaintiff after he was ejected by virtue of
56 legal process in May, 1868, and the decision thereupon by the Land Department. The plaintiff is entitled to judgment upon the pleadings and findings for the possession of the lands described in the complaint, and for the rents and profits at the rate admitted by the answer, and his costs; but as there was no finding upon the issue as to the value of the rents and profits, he is entitled to a new trial, if he so elects.

Judgment and order reversed and cause remanded for further proceedings in accordance with this opinion.

Remittitur forthwith.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment and order of the district court of the 8th judicial district in and for the county of Humboldt in the above-entitled cause be, and the same is hereby, reversed with costs, and cause remanded for further proceedings, in accordance with the opinion.

Remittitur forthwith.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment and opinion entered in the above-entitled cause on the 25th day of November, A. D. 1879, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 26th day of November, A. D. 1879.

[SEAL.] D. B. WOOLF, *Clerk*,
By H. P. BUSH, *Deputy*.

57 (Endorsed:) Filed November 28th, 1879. W. J. McKenna, clerk, by J. S. Gibson, deputy.

[Title of Court and Cause.]

This action came on regularly before said court at its December term, A. D. 1879, upon the pleadings and the findings of fact filed herein on March 27th, A. D. 1878, and upon the remittitur filed herein from the supreme court of the State of California; and the said plaintiff having waived the privilege of a new trial of said action, awarded to the said plaintiff by the judgment of the supreme court of the State of California rendered in said action on appeal thereto: Now at this time, upon motion of J. J. DeHaven, one of

the attorneys for plaintiff, this court does now, upon the said pleadings and findings of fact, and in accordance with, and in obedience to, the judgment of the supreme court of the State of California rendered in said action on appeal thereto, order, adjudge, and decree that the plaintiff shall have and recover from the defendant the possession of the lands described in the complaint, to wit: The southwest quarter of section 29, township 7 north, range 1 east, H. M., together with the sum of two hundred and sixty-five dollars, the value of the rents and profits thereof from April 14th, 1877, to the date hereof, as damages, and his costs of this action, amount-
58 ing to the further sum of $8——. It is further ordered, adjudged, and decreed that the judgment and decree heretofore in this court entered in said action on March 27th, 1878, is vacated and set aside. Done in open court this 15th day of December, A. D. 1879.

J. P. HAYNES,
District Judge.

(Endorsed:) Judgment. Filed December 15, 1879. Wm. J. McKenna, clerk.

Notice of Appeal.

[Title of Court and Cause.]

You will please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of this State from the judgment therein made and entered in the 8th district court in and for said county, on the 15th day of December, A. D. 1879, in favor of the plaintiff in said action, and against said defendant, and from the whole thereof.

Dated this 28th day of February, A. D. 1880.

S. M. BUCK,
Attorney for Defendant.

To the clerk of said district court and J. J. DeHaven, attorney for plaintiff.

(Endorsed:) Notice of appeal. Filed February 28th, 1880. Wm. J. McKenna, clerk.

Service and receipt of a copy hereof admitted after filing, this 28th day of February, 1880.

J. J. DEHAVEN,
Attorney for Plaintiff.

59 [Title of Court and Cause.]

I, the undersigned, county clerk of Humboldt county, State of California, and *ex-officio* clerk of the superior court in and for said Humboldt county, do hereby certify:

That the foregoing are full, true, and correct copies of the complaint, answer, and cross-complaint, plaintiff's answer to cross-complaint, findings of court, original judgment of the eighth judicial district court in and for said Humboldt county, judgment and opinion of

the supreme court of California, final judgment of said eighth district court, and notice of appeal, with the endorsements thereon, as the same now appears of record in my office.

I further certify that an undertaking on appeal in due form has been properly filed by defendant in said action.

In witness whereof, I have hereunto set my hand and affixed the seal of said superior court, this 28 day of February, A. D. 1880.

[SEAL.] W. J. McKENNA,
Clerk as aforesaid.
By J. S. GIBSON, *Deputy.*

60 *Judgment.*

In the Supreme Court of the State of California. Department One.

AUGUST 22D, 1881.

D. N. DILLA, Respondent,
vs.
WALTER BOHALL, Appellant. } No. 7178.

On appeal from the district court of the 8th judicial district in and for the county of Humboldt.

And now at this day this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by the court:

Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment of the district court of the 8th judicial district in and for the county of Humboldt in the above-entitled cause be, and the same is hereby, affirmed with costs.

61 *Opinion.*

In the Supreme Court of the State of California. Department One.

DILLA
vs. } 7178.
BOHALL.

The court:

The questions now presented were finally determined on the former appeal.

Judgment affirmed.

Endorsed: Filed March 3d, 1882. F. W. Gross, clerk, by C. Harlan, deputy.

62 *Petition for Writ.*

To the Honorable Robert F. Morrison, chief justice of the supreme court of the State of California:

And now comes Walter Bohall, by S. M. Buck and W. W. Cope, his attorneys, and complains that in the records and proceedings,

and also in the rendition of a judgment in a suit between D. N. Dilla, plaintiff, and Walter Bohall, defendant, in the supreme court of the State of California, being the highest court of law or equity in said State in which a decision could be had in said suit, and in which a final judgment was rendered against him on the 22d day of August, 1881, in said suit, wherein said Bohall claimed the title to and the right and privilege of acquiring title to certain lands under a statute of the United States, viz., the pre-emption laws of the United States, which lands were subject to pre-emption under said laws, and the decision of said supreme court of California was and
62¼ is against said right, title, and privilege of said Bohall set up and claimed by him under said statutes of the United States aforesaid, all which appears in the record and proceedings in said suit; and manifest error hath happened, to the great damage of the said Walter Bohall:

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

S. M. BUCK,
W. W. COPE,
Attorneys for Plaintiff in Error, Walter Bohall.

The foregoing petition having been read and considered by me, ordered that the writ of error therein prayed for be, and the same is hereby, allowed.

R. F. MORRISON,
Chief Justice of the Supreme Court of California.

62½ Endorsed: Filed Jan'y, 1882. F. W. Gross, clerk, by C. Harlan, deputy.

63 *Bond on Writ of Error.*

In the Supreme Court of the State of California.

Know all men by these presents, that Walter Bohall, as principal, and C. B. Stone and Robert Searles, as sureties, are held and firmly bound unto D. N. Dilla in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said D. N. Dilla, his executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 16th day of January, A. D. one thousand eight hundred and eighty-two.

The condition of the above obligation is such, that whereas lately, at a supreme court of the State of California, in a suit pending in said court between said Dilla and said Bohall, a judgment was ren-
64 dered against said Bohall, and the said Bohall having obtained a writ of error, and filed a copy thereof in the clerk's office of said court, to reverse the judgment in said suit, and a citation directed to said Dilla, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden

at Washington, the second Monday of October, 1882: Now, if said Bohall shall prosecute said writ to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; otherwise, to remain in full force and virtue.

WALTER BOHALL, [SEAL.]
By S. M. BUCK, *His Att'y.*
C. B. STONE. [SEAL.]
ROBERT SEARLES. [SEAL.]

Signed, sealed, and delivered in presence of—
CHAS. E. KELLY.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

C. B. Stone and Robert Searles, being severally sworn, each for himself deposes and says:

That he is worth the sum of five hundred dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

C. B. STONE.
ROBERT SEARLE.

Subscribed & sworn before me, this 16th day of January, 1882.
[SEAL.] CHAS. E. KELLY.
Notary Public.

65 I approve the within bond and the sufficiency of the sureties thereto.

R. F. MORRISON,
Chief Justice of the Supreme Court of California.

Dated Jan. 16th, 1882.

Endorsed: Filed Jan'y 18th, 1882. F. W. Gross, clerk, by C. Harlan, deputy.

66 *Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court before you, between D. N. Dilla, plaintiff, and Walter Bohall, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme
67 Court of the United States of America, together with this writ, so that you have the same at the city of Washington,

in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Supreme Court may cause further to be done therein to correct that error what of right and according to law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 18th day of January, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the 106th.

[SEAL.] L. S. B. SAWYER,
Clerk of the Circuit Court of the United States for the District of California.

[Endorsed:] In the supreme court of the State of California. D. N. Dilla, plaintiff & respondent, *v.* Walter Bohall, defendant & appellant. Writ of error. Filed Jan'y 18, '82. F. W. Gross, clerk, by C. Harlan, deputy.

68 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To D. N. Dilla, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1882, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein Walter Bohall is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 18th day of January, A. D. 1882, and of the Independence of the United States the 106th.

R. F. MORRISON,
Chief Justice of the Supreme Court of the State of California.

69 [Endorsed:] 7178. United States Supreme Court. Walter Bohall, plaintiff in error, *vs.* D. N. Dilla, defendant in error. Citation. Copy served upon me and service of the within citation acknowledged this 25th day of January, A. D. 1882. J. J. DeHaven, att'y for def't in error. Filed Jan'y 30, '82. F. W. Gross, clerk, by C. Harlan, deputy.

70 *Assignment of Errors.*

Supreme Court of the United States.

WALTER BOHALL, Plaintiff in Error,
v.
D. N. DILLA, Defendant in Error.

Assignment of Errors.

And now comes said Walter Bohall, by S. M. Buck and W. W. Cope, his attorneys, and say that in the record and proceedings aforesaid there is manifest error in that—

The facts being found and fully established by the court and admitted by the pleadings, judgment thereon was given for said D. N. Dilla, against said Walter Bohall, whereas by the law of the land, and in equity and good conscience, said judgment ought to have been given for the said Walter Bohall against the said D. N. Dilla, because—

1st. It appears from said facts that said Dilla never acquired any right to pre-empt the land in controversy.

71 2nd. That said Bohall was a qualified pre-emptor and had complied with all the requirements of the pre-emption laws of the United States and should have been allowed to pre-empt said land; but the land officers of the United States, by mistake and error of law, allowed said Dilla to pre-empt said land, and that but for such mistake of law, they would have allowed said Bohall to pre-empt the same, and said Bohall would have pre-empted the same.

By reason whereof said judgment ought to have been given for said Bohall against said Dilla.

Wherefore said Walter Bohall prays that the judgment aforesaid may be reversed and annulled, and that the judgment of the eighth district court, duly given and made on the 27th day of March,

72 1878, be revived, and that he may be restored to all things he hath lost by reason of said judgment erroneously entered against him.

S. M. BUCK,
W. W. COPE,
Attorneys for Walter Bohall, Plaintiff in Error.

73 [Endorsed:] Filed Jan'y 18, '82. F. W. Gross, clerk, by C. Harlan, deputy.

74 *Clerk's Certificate.*

In the Supreme Court of the State of Califorina.

WALTER BOHALL, Plaintiff in Error,
vs.
D. N. DILLA, Defendant in Error.

I, Frank W. Gross, clerk of the supreme court of the State of California, do hereby certify that the foregoing 72 pages, numbered from 1 to 72, both numbers inclusive, contain a full, true, and correct

transcript of the proceedings in the cause above entitled, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of the said court, this 7th day of March, 1882.

[SEAL.] FRANK W. GROSS, *Clerk*,
By C. HARLAN, *Deputy*.

Endorsed on cover: California supreme court. No. 194. Walter Bohall, plaintiff in error, *vs.* D. N. Dilla. Filed 10th April, 1882.

In the Supreme Court

OF THE

UNITED STATES.

No. 194.

Walter Bohall,

Plaintiff in Error,

vs.

D. N. Dilla,

Defendant in Error.

Brief of Plaintiff in Error.

S. M. BUCK,
Attorney for Plaintiff in Error.

W. W. COPE,
Of Counsel.

San Francisco:
S. W. Raveley, Printer.
1884.

In the Supreme Court

OF THE

UNITED STATES.

No. 194.

Walter Bohall,

Plaintiff in Error,

vs.

D. N. Dilla,

Defendant in Error.

Brief of Plaintiff in Error.

S. M. BUCK,
Attorney for Plaintiff in Error.

W. W. COPE,
Of Counsel.

San Francisco:
S. W. Raveley, Printer.
1884.

In the Supreme Court of the United States.

No. 194.

WALTER BOHALL,
PLAINTIFF IN ERROR,

vs.

D. N. DILLA,
DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

The action was originally brought in the Eighth Judicial District Court in and for the County of Humboldt, State of California.

It was the Code action of Ejectment for the possession of a quarter section of Land. Defendant in error was plaintiff. The complaint contained the simple allegations of ownership in plaintiff, and ouster and possession by defendant.

Rec. fol. 2.

The answer sets up an equitable defense and cause of action against plaintiff, wherein it is alleged that the land in controversy had been awarded to Dilla by the Interior Department, upon a contest therefor, by mistake and error.

Rec. fol. 4 to 15.

The case was tried in the District Court, and upon the evidence adduced upon such trial the Court made its Findings of Fact and Conclusions of Law.

Rec. fol. 37 to 49.

In accordance therewith, judgment was entered in favor of Bohall and against Dilla, on the 27th day of March, 1878.

Rec. fol. 52.

The Supreme Court of California reversed judgment and granted a new trial.

Rec. fol. 54 to 57.

And afterwards Dilla obtained a judgment for the possession of the land in controversy, on December 15th, 1879.

Rec. fol. 57.

This last judgment was upon appeal affirmed by the Supreme Court of California, on March 3d, 1882.

Rec. fol. 60–61.

From this final judgment of the Supreme Court of California, Bohall sued out a writ of error from this Court, and upon that the case is here for adjudication.

The questions involved in this case, and to be determined by this Court, may be resolved into the following succinct propositions:

I. *Dilla never acquired any right to pre-empt the land in controversy.*

II. *Bohall was a qualified pre-emptor, and fully complied with all the requirements of the pre-emption laws.*

III. *Bohall was entitled to pre-empt the land in controversy, when the contest was had before the Register and Receiver in March,* 1878.

IV. *But even if Bohall's residence upon the land in controversy was not sufficient, he was lawfully on the land, and had an inceptive right which he had a lawful right to complete and perfect; and he did complete and perfect this right afterwards, which gave him a perfect equitable title as against all other individuals.*

And because the Court below determined the foregoing propositions against plaintiff in error (Walter Bohall), he

assigns the same as errors, and relies upon them here as grounds for reversing the judgment of the Supreme Court of California.

Rec. fol. 70–71.

I.

Dilla never acquired any right to pre-empt the land in controversy.

Dilla's connection with the land was as follows: By fraud and deceit he induced Bohall to agree to sell him the land with the improvements thereon; and by the same means got possession of Bohall's improvements on the land.

This was in the spring of 1865.

Rec. fol. 37, 38, 39.

Burrill *vs.* Stevens, 73 Maine, 396.

As soon as Bohall discovered Dilla's fraud, he commenced a suit in the proper Court against Dilla to recover his property; and in the spring of 1868, he was duly placed in possession thereof by the Sheriff, under a writ of possession issued from the proper Court.

Rec. fol. 40.

This judgment was twice reversed on technicalities, but finally affirmed by the Supreme Court of California.

Rec. fol. 40, 41, 42.

Dilla never resided upon the land afterwards; never erected or owned a dwelling upon the land, nor made any other occupation, except the time he wrongfully held Bohall's house and improvements; although he had from 1868 until 1875 within which to do it.

Rec. fol. 44.

These facts were all proved to the satisfaction of the proper Register and Receiver.

Rec. fol. 45.

Whereupon the Receiver decided that Dilla was entitled to pre-empt the land.

Rec. fol. 27.

And the Register decided that Dilla had no such right.

Rec. fol. 27–28.

The decision of the Receiver was afterwards sustained by the Commissioner and Acting Secretary of the Interior.

The decision of the Register should have been sustained because:

Dilla could not acquire any right of pre-emption upon the land by reason of his possession of Bohall's improvements, obtained by fraud. Such is not the settlement contemplated and required by the pre-emption law. If falls directly within the rule laid down in Beebe *vs.* Hurlbut. Copp's Public Land Laws, first edition, page 315.

Atherton *vs.* Fowler, 96 U. S., 519.
Rector *vs.* Gibbon, 111 U. S. S. C., 285 *et seq.*

Nor did Dilla ever erect or own a dwelling house upon the land in controversy. This fact was found by the Receiver and Register and by the Court. Indeed it was a conceded fact.

Rec. fol. 26, 27, 44.

Without this *he had no right* whatever to pre-empt the land.

Ferguson *vs.* McLaughlin, 96 U. S., 175.
Helly *vs.* Wallace, 14 Minn., 236.
Rev. Stat. U. S., Sec. 2259.

After the spring of 1868, Dilla wholly abandoned the land in controversy. This fact was found by the Register and by the Court.

Rec. fol. 26, 27, 44.

The land officers sought to excuse Dilla's non-compliance with the pre-emption law as follows: They say in substance, that they will not take cognizance of the admitted

fact that Dilla obtained possession of Bohall's improvements by fraud and deception. That this was an immaterial fact.

The Receiver said: "It is our opinion that any agreement not in conflict with the pre-emption laws, to obtain his, Bohall's, consent for Dilla to go upon the land, *made in good faith or otherwise*, is not a question for our consideration, or one that can affect the right of Dilla to make settlement upon public land as a pre-emptor."

Rec. fol. 25.

This sentiment was indorsed by the Acting Secretary of the Interior.

Rec. fol. 31.

The fact that Dilla never erected nor owned a dwelling house on the land in controversy was excused by the Receiver as follows:

"*Prima facie*, Dilla owned a house on the land he claims up to the time of his ejectment. There was a house on the land in his possession, which served him as a dwelling. Another house was unnecessary." "By the judgment of the Court and by possession the house and other improvements are Bohall's."

Rec. fol. 26.
Chicago *vs.* Wiggins, 108 U. S., 18.

The Commissioner sought to excuse it as follows:

"Since the commencement of the trial, and during a continuance which had been granted, Dilla went upon the land, put up a temporary cabin and took up his residence there."

Rec. fol. 30.

This statement of the Commissioner was utterly false and made without any evidence.

Rec. fol. 46.

But even if true, plaintiff could acquire no right against

defendant, after the trial had commenced which was to test plaintiff's right to the land.

This proposition of law is axiomatic.

The Receiver, Commissioner and Acting Secretary of the Interior sought to excuse Dilla's abandonment of the land in the spring of 1868, and want of residence upon it ever after, by saying that Dilla could not make a residence there without being in contempt of Court.

Rec. fol. 26, 32, 46.

There are two very obvious answers to this proposition.

1st. The facts found show that the amount of land in actual possession of Bohall during all that time was twenty-five or thirty acres.

Rec. fol. 37.

This shows that over one hundred acres of the land in controversy was during all of said time unsurveyed, unoccupied public land, and Dilla or any other qualified pre-emptor could at any time have entered thereon, and erected a dwelling house and resided there.

2d. It would have been no contempt of Court.

Larrabee *vs.* Selvy, 52, Cal., 506.
Mahoney *vs.* Van Winkle, 33 Cal., 448.

And so the Court found that such statements made by said land officers, in order to excuse a want of residence by Dilla, was made *erroneously and by mistake of law.*

Rec. fol. 45–46.

3d. Even if all the land had been in the actual possession of Bohall, and Dilla could not have gone upon the land without being in contempt of Court, that could not be used as an excuse for his non-compliance with the requirements of the pre-emption law. A person kept out of possession of land by the judgment of a competent Court having jurisdiction of the subject matter and person, is *rightfully* kept out;

and such a judgment cannot be twisted to operate to confer rights upon him which he would not otherwise have possessed. But the Acting Secretary of the Interior says that to give effect to the judgment of the State Court would be allowing the State to dispose of public land.

Rec. fol. 32-33.

The error of this statement is too obvious for argument. The State Court was the only Court that has jurisdiction to adjudicate the rights of the parties to the possession of those improvements on unsurveyed government land. No United States Court could have taken jurisdiction of that question. And if the suit could have been adjudicated, and had been adjudicated in a United States Court, the judgment pronounced would have been no more efficacious than that pronounced by the State Court. But the State Court, having jurisdiction of the parties and subject matter, full effect must be given to the judgment pronounced by it.

Chicago *vs.* Wiggins, 108 U. S., 18.

If this is not the case, then parties cannot resort to any Court to litigate their disputes touching improvements upon and rights of possession to public land. They must be relegated to the shotgun and rifle to settle their conflicting claims. This Court will hesitate to establish this latter doctrine, so cheerfully and flippantly promulgated by the Acting Secretary of the Interior. This is probably the first time in the history of jurisprudence that any tribunal in a civilized country has sought to give such an effect to such a judgment.

Beebe *vs.* Hurlbut, Copp's Public Land Laws, First Edition, 315.

Chicago *vs.* Wiggins, 108 U. S., 18.

And so the Court found that such statement of the land officers, made to excuse a residence by plaintiff, *were made erroneously* and by *mistake of law.*

Rec. fol. 46.

It will be observed that all the facts and circumstances regarding Dilla's settlement and residence upon the land in controversy, as well as the fact that he never erected or owned a dwelling house thereon, were conceded and admitted in every controversy between Dilla and Bohall. That being the case, whether or not Dilla did comply with the requirements of the pre-emption law as to residence or otherwise, was and is purely a question of law.

Insurance Co. *vs.* Evans, 9 Maryland, 1.
Gay *vs.* Moss, 34 Cal., 133.

In Silver *vs.* Ladd, the Commissioner of the General Land Office had decided that the donee, Mrs. Thomas, was not entitled because "*she was not a settler on the land.*" Yet the facts from which the Commissioner deduced his conclusion, being before the Court, the decision of the Commissioner was reversed.

Silver *vs.* Ladd, 7 Wall., 220.

So in Johnson *vs.* Towsley, the Court said: "We are not prepared to concede that, when, in the application of the facts as found by them, they, by misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the Courts are without power to give any relief."

Johnson *vs.* Towsley, 13 Wall., 86.
Warren *vs.* Van Brunt, 19 Wall., 653.
Rector *vs.* Gibbon, 111 U. S. C., 285 to 292.

If the foregoing cases teach anything, it is that where the facts, which were before the land officers are before the Court as in this case, the Court will look at them and ascertain whether or not those officers have misapplied the law to the injury of the complainant.

It follows, that Dilla never had any legal right to pre-empt the land in controversy.

II.

Bohall was a qualified Pre-emptor, and fully complied with all the requirements of the Pre-emption Law.

The contest between Dilla and Bohall before the Register and Receiver was brought on by Dilla in March, 1875, barely fifteen months after the plats of the survey of the land in controversy had been in the proper land office. Bohall did not *voluntarily* go to the Land office and prove up at that time as a pre-emptor; but he went in answer to a citation to *contest Dilla's right.*

Rec. fol. 45.

The plat of the land in controversy was filed on October 2d, 1873.

Rec. fol. 44.

At that time Bohall had a valid Declaratory Statement on file, and was residing upon the land with his family.

Rec. fol. 44.

If his residence upon the land at that time was not sufficient, he had a right to complete it as against all the world, unless some better right intervened. We have already shown that *Dilla had no right.* In illustration of this point I will quote a recent decision of the Commissioner of the General Land Office, made in the case of:

McCHARLES
vs.
WOOD.

Omitting the preliminary statements, the opinion is as follows:

"The testimony submitted shows that the plaintiff was at the time of his settlement and filing, a single man, a laborer by occupation, and a qualified pre-emptor; that he made settlement in person on the land in controversy some time in August, 1876, built a small house thereon, which was completed the last of September of the same year.

That at the date of this contest he had fenced one and a half acres of land; two-thirds of which was sown in grain; his entire improvements on said land being valued at about $60. The plaintiff's occupation of the land seems to have been very irregular and at long intervals, his own testimony going to show that from the date of his alleged settlement —July 17th, 1876, to the time of trial, March 6th, 1877— a period of eight months, he had actually resided on the land about a month.

It was also shown that he first took provisions and bedding on the claim some time in January, 1877—six months after his alleged settlement. That he had no cooking utensils, farming implements or stock of any kind on the land. He also admits that the tract on which he built his house, also that which he plowed, was enclosed with a fence when he first went there, and that said land was under cultivation.

It is shown that defendant Wood first settled on the land in 1865, prior to the survey of the same; that himself and his brother settled on adjoining tracts at that date, and commenced to improve the same. That defendant built a house which, after the survey, he found to be on land adjoining that in dispute, and distant therefrom some four or five rods. That he continued to reside in that house on adjoining land, with his family, though he cultivated and improved the land in contest. That in June, 1876, in order as he states, to avoid a contest, he, defendant, purchased the improvements of Mattock on the land in controversy, said Mattock having filed a D. S. thereon, paying $600 for the improvements and possession. That these improvements consisted of a house, fencing, etc.

That he continued to cultivate the said land from the date of his settlement up to the time of trial. It appears, therefore, that defendant has complied with the requirements of law, except in the matter of personal residence on the land; and having made two pre-emption filings. It is shown that he has the greater portion of the land fenced in

a substantial manner, has other valuable improvements thereon, and has cultivated the same for the last fifteen years; but it is shown by his own testimony that he has never made his personal residence on said land; in fact, has never been on the land with his family to remain over night except on two occasions; the first on the 5th of July, 1876, when he spent the night there, and his family remained same four or five days; and the second and last time on the 20th of December following, when he remained only twenty-four hours.

He states, however, as a reason for his non-residence upon the land in dispute, that sickness in his family made it necessary for him to be in more commodious quarters; and that it was his intention to go there to reside as soon as he could.

While it is shown that the defendant's residence upon the land in contest has not been in accordance with the requirements of law, yet in view of the fact that he has continued to cultivate the land, and has, by purchase and otherwise, placed valuable improvements thereon, I am of the opinion that in view of the principles enunciated in the decision of the United States Supreme Court in the case of Atherton *vs.* Fowler, 7 Otto, 513: *This claimant should be protected in his rights, and allowed additional time within which to show a compliance with the requirements of law in the matter of residence upon the land claimed by him.*

On the same grounds I hold that plaintiff is a trespasser on said land, he having forcibly intruded upon the possession of one who had already settled upon, improved and enclosed said tract. His claim is therefore rejected, &c."

We omit the balance of the opinion, which has no bearing upon this case.

Under the foregoing doctrine, surely Bohall should have been permitted to complete his residence if it was not sufficient. The fact that Dilla intruded upon Bohall's improvements by *fraud* gave him no more *right* than if such intrusion had been by *force*.

Belding *vs.* Frankland, 8th Lea (Tenn.), 68.

At this time Bohall still had fifteen months within which to complete his residence and prove up and pay for the land; for he had thirty months after the plat was filed within which to do it; and even if not done within thirty months, no forfeiture occurred except in favor of the *next settler*.

Revised Stat. U. S., Sec. 2265, 2267.
Johnson *vs.* Towsley, 13 Wall., 90, 91.

The Land Department requires a residence of only six consecutive months.

2 Lester, 279.
Copp's Public Land Laws, First Edition, 303.

It follows, that when Bohall went to the proper Land Office in December, 1876, and offered to prove a continuous residence upon the land, of himself and family for twenty consecutive months immediately preceding, together with all other facts necessary to entitle him to pre-empt the land in controversy; and also to pay for the land and the proper fees of the Register and Receiver, his equitable right to the land became perfect.

Rec. fol. 47.

As between the parties hereto, this gave Bohall the better right; and upon this ground alone the original decree of the District Court should have been affirmed by the Supreme Court of California.

Lytle *vs.* Arkansas, 9 How. U. S., 333.
Cunningham *vs.* Ashley, 14 How. U. S., 377.
Shepley *vs.* Cowan, 91 U. S., 331, 339.

And the Land Department would have awarded the land to Bohall, and found that he "was entitled to pre-empt said land unless plaintiff (Dilla) had the better right."

Rec. fol. 45.

This establishes the proposition that in fact and in law Bohall was a qualified pre-emptor, and had fully complied with all the requirements of the pre-emption laws.

III.

Bohall was entitled to pre-empt the land when the contest was had before the Register and Receiver in March, 1875.

The following undisputed facts were before the Register and Receiver at that time:

In 1862 Bohall purchased the land in controversy, with improvements thereon, consisting of a good substantial dwelling house, barn and other buildings, and twenty-five acres of land fenced and under cultivation.

Bohall immediately took possession of the land with intent to pre-empt it; and held it till 1865. By reason of an Indian war then raging, it was unsafe for him to move his family on the land.

Rec. fol. 47.

In the spring of 1865 Dilla obtained possession of the land by fraud and deception, and wrongfully kept Bohall out of the land till the spring of 1868, at which latter time Bohall was restored to the possession of his property by due process of law.

Rec. fol. 38, 39, 40, 41, 42.

In the spring of 1868 Bohall moved upon the land with his family, with intent to pre-empt the same.

Rec. fol. 42.

He lived upon the land with his family continuously till the fall of 1869, when he left the land temporarily to procure employment, and thereby to earn means by which to improve the land; and during such temporary absence he did expend upon the land in controversy $700.

Rec. fol. 42, 43.

In the spring of 1872 Bohall left the land again for a specific purpose and temporarily, with intent to return as soon as he had performed a certain specific duty requiring his absense. He did return as soon as such duty was performed.

Rec. fol. 42.

During the winter of 1874 Bohall took his family into the town of Arcata, for the double purpose of enabling him to send his children to school, and that he might procure employment, as he could do nothing upon the land in the winter. As soon as winter had passed—early in the spring of 1875—Bohall took his family back upon the land in controversy, and has from thence resided upon the land with his family.

Rec. fol. 43.

During all said time after 1868 Bohall resided upon the land *with intent* to comply with the requirements of the pre-emption laws, and *with intent* to pre-empt the same in good faith, and from thence has had *no other home for himself or family, etc.*

Rec. fol. 43.

Bohall during all of said times possessed all the qualifications entitling him to pre-empt.

Rec. fol. 36.

These facts were proved to the satisfaction of the proper Register and Receiver, who found the same to be true.

Rec. fol. 45.

Said Register and Receiver both found that Bohall had fully complied with the law as regards residence, and that Bohall was entitled to pre-empt the land unless Dilla had the better right.

Rec. fol. 45.

The Register decided that Bohall was entitled to pre-empt the land in controversy.

Rec. fol. 28–45.

The foregoing so proved to the satisfaction of the Register and Receiver, and found by them to be true gave Bohall a right to pre-empt the land; and the decision of the Commissioner and Acting Secretary of the Interior awarding the land to Dilla was made by an error of law;

and but for Dilla's contest would have awarded the land to Bohall.

Rec. fol. 45.

But it is contended that the Commissioner of the General Land Office found as a fact that Bohall had not complied with the pre-emption law as regards residence. This is based upon an observation contained in the Commissioner's opinion. It is as follows :

"*Bohall has clearly failed to comply with the law as regards residence. The pre-emption law requires a continuous personal residence.*" "*This Bohall has not had, and the residence by his tenants will not operate to cure the defect.*"

This is clearly an erroneous conclusion of law from the facts.

1st. Bohall had no tenants on the land. The Receiver called the men hired by Bohall to work upon the land during his absence, tenants. This was reiterated by the Commissioner.

Rec. fol. 24–30–43.

This was a mistake of law, made by the Receiver through *ignorance*, and by the Commissioner repeated perhaps through inadvertance.

2nd. As to the balance of the Commissioner's assertion it will be observed that he did not find any fact different from those found by the Register and Receiver in regard to residence. The Commissioner was simply of opinion that defendant could not leave the land at all during six years for any purpose without forfeiting his right to pre-empt it. This conclusion was not only erroneous as a conclusion of law, but contrary to all precedent. A continuous personal residence of six months only, is all that has ever been required by the Land Department to entitle a person to pre-empt.

2 Lester's Land laws, 279.

So the whole case of Dilla is made to rest upon the gratuitous remarks of the Commissioner as to Bohall's want of residence.

3rd. But treating it as a finding, still it was not a finding of fact; but an erroneous *legal conclusion* drawn from the undisputed facts and circumstances.

Rec. fol. 42–43–45–46.

It is a universal rule that where all the facts and circumstances—upon which any *ultimate* fact depends—are conceded, the question whether or not they establish such *ultimate* fact becomes a question of law. So it has been expressly held, that where all the facts and circumstances are admitted a *question of waiver is a matter of law.*

Insurance Co. *vs.* Evans, 9 Md., 1.
Gay *vs.* Moss, 34 Cala., 133.

There was no question but that Bohall made the required settlement in the spring of 1868.

That thereafter he occupied and cultivated the land constantly; and spent a large amount of money in improving it, with intent to make it his permanent home. That he never left it except temporarily, and with intent of immediately returning as soon as he could perform some specific duty which called him away.

Rec. fol. 42.

All the authorities agree that under such a state of facts there is no change of residence, and such is the *legal conclusion* from such facts.

Revised Stat. U. S. Sec. 2259.
State *vs.* Judge, 13 Ala., 806.
Copps' Public Land Laws, First Edition.
Baker *vs.* Hess, 236.
Lincoln *vs.* Hapgood, 11 Mass., 350.

Upon the conceded facts, the trial Court determined that the Commissioner did by mistake, error and misconstruc-

tion of the law come to a wrong conclusion; and that defendant had a sufficient residence to entitle him to pre-empt the land.

Rec. fol. 45–46.
Silver *vs.* Ladd, 7 Wall., 220.
Johnson *vs.* Towsley, 13 Wall., 87.
Warren *vs.* Van Brunt, 19 Wall., 653.
Sampson *vs.* Smiley, 13 Wall., 91.
Rector *vs.* Gibbon, 111 U. S. 220, *et seq.*

IV.

If Bohall's residence was not sufficient, he was lawfully on the land, and had an inceptive right, which he could lawfully complete and perfect by a sufficient residence thereafter. And although Bohall could not insist upon this right as against the Government, yet no third party, like Dilla, having no right, could lawfully step in and deprive him of it.

Bohall did complete this right, by living continuously on the land in controversy with his family for twelve months thereafter, when he offered to make all necessary proof to the Register and Receiver, and tendered payment for the land.

The whole question to be solved, is whether under the facts found in this case and admitted by the pleadings, Bohall has not the better right.

In determining questions of this character this Court at an early day laid down a rule for our guidance. It said:

"It is an inquiry of vast importance whether in deciding "claims of this decription, a Court of equity acts upon its "known, established and general principles, or is merely "substituted for a court of law." * * *
"In all cases in which a court of equity takes jurisdiction "it will exercise that jurisdiction upon its own principles." * * * "The Court will therefore "entertain jurisdiction of the cause, but will exercise that "jurisdiction in conformity with the settled principles of a "Court of Chancery."

Bodley *vs.* Taylor, 5 Cranch., 222.

"This Court has at all times been careful to guard itself "against an invasion of the functions confided by law to "other departments of the Government, and in reference to "the proceedings before the officers intrusted with the "charge of selling the public lands it has frequently and "firmly refused to interfere with them in the discharge of "their duties, either by mandamus or injunction, so long as "the title remained in the United States, and the matter "was rightfully before those officers for decision."

"On the other hand it has constantly asserted the right "of the proper courts to inquire after the title had passed "from the Government, and the question became one of "private right, whether *according to the established rules of* "*equity*, and the acts of Congress concerning the public land, "the party holding that title should hold it absolutely as "his own, or as trustee for another."

Johnson *vs.* Towsley, 13 Wall., 87.
Warren *vs.* Van Brunt, 10 Wall., 653.
Rector *vs.* Gibbon, 111 U. S. S. C., 284, *et seq.*

"In Lytle's case, we decided that the occupant was "wrongfully deprived of his lawful right of entry, under the "pre-emption laws, and the title set up under the selection "of the Governor of Arkansas was decreed to Cloyes, the "claimant, this court holding his claim to the land to have "been a legal right, by virtue of the occupancy and cultiva- "tion, subject to be defeated only by a failure to perform "the conditions of making proof and tendering the pur- "chase money. There the *facts* were examined to ascer- "tain which had the *better right.*"

Barnard *vs.* Ashley, 18 How., 45-6.

The whole question therefore resolves itself into this:

Which of these parties has the better right to the land in controversy according to the established rules of equity, and the laws of Congress governing the disposition of lands.

Indeed it is a universal rule that the *superior equity* must prevail in equitable actions.

What are the equities of the parties hereto ?

1st. We find that in the spring of 1865 Dilla sought to defraud Bohall of his improvements upon the land; and in pursuance of his unlawful design, by fraud he obtained possession of such improvements. That in the spring of 1868 Dilla was evicted, and the possession of the improvements was restored to Bohall, the true owner, by due process of law. That Dilla never built or owned any dwelling house upon the land, nor any improvements thereon; and after his eviction from the land in 1868, he never sought to reside upon it, nor did he comply with any of the requirements of the pre-emption law. This want of compliance with the law was excused by the Land Department on the ground that he was kept out of possession of the land by a valid judgment. But that gives him no equity.

Ante Point 1.

2nd. Contrast these acts of Dilla with those of Bohall. In 1862 Bohall purchased the possessory right to the land in controversy, with improvements thereon, consisting of a dwelling house, barn and other buildings, and twenty-five acres of land under fence and cultivation. He immediately took possession of the land and improvements, with intent to pre-empt the same, but by reason of an Indian war then raging it was unsafe for him to move his family upon the land. But he continued in possession of the land till 1865, when by the fraudulent representations of Dilla he was induced to surrender his possession. In 1868 Bohall having recovered possession of his improvements, moved his family upon it, and took up his residence there for the purpose of pre-empting it and making his home upon it.

From thence till 1875 when Bohall was cited to *contest Dilla's right to pre-empt the land* he had no other home ; was never absent except for some specific and praiseworthy purpose ; and during his first absence he earned and expended upon the land $700.

Rec. fol. 37 to 45.

Bohall has since made the place his permanent home. The improvements upon this land represent the result of eighteen years of hard labor performed by Bohall. It is not pretended that Dilla ever owned one dollar's worth of improvements upon the land in controversy. It is an established fact that the only possession he ever had of any portion of the land in controversy, was obtained by a gross and willful fraud.

The whole policy of the government, and its aim in all its legislation in regard to the disposition of the public domain to settlers, has been to protect those who, *in good faith*, settled upon public land and made improvements thereon; not "those who by violence or *fraud*, or *breaches of contract* intruded upon the possessions of original settlers, and endeavored to appropriate the benefit of their labors. There has been in this respect, in the whole legislation of the country a consistent observance of the rules of natural right and justice."

Rector *vs.* Gibbon, 111.
U. S. S. C., 284.

Where is Dilla's equity? Why does he not fall within the foregoing rules? I have no hesitation in asserting that if the judgment in favor of Dilla is sustained, that individual will have succeeded in robbing Bohall of the fruits of a life of industry with no more moral right to them than has the highway robber to the money of his victim.

We respectfully submit that the judgment of the Supreme Court of California should be reversed, and that judgment be entered in favor of Bohall in accordance with the prayer of the answer and equitable defense therein set out.

S. M. BUCK,
Attorney for Plaintiff in Error.

W. W. COPE,
Of Counsel.

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In the Supreme Court

OF THE

UNITED STATES.

No. 194.

Walter Bohall,

Plaintiff in Error,

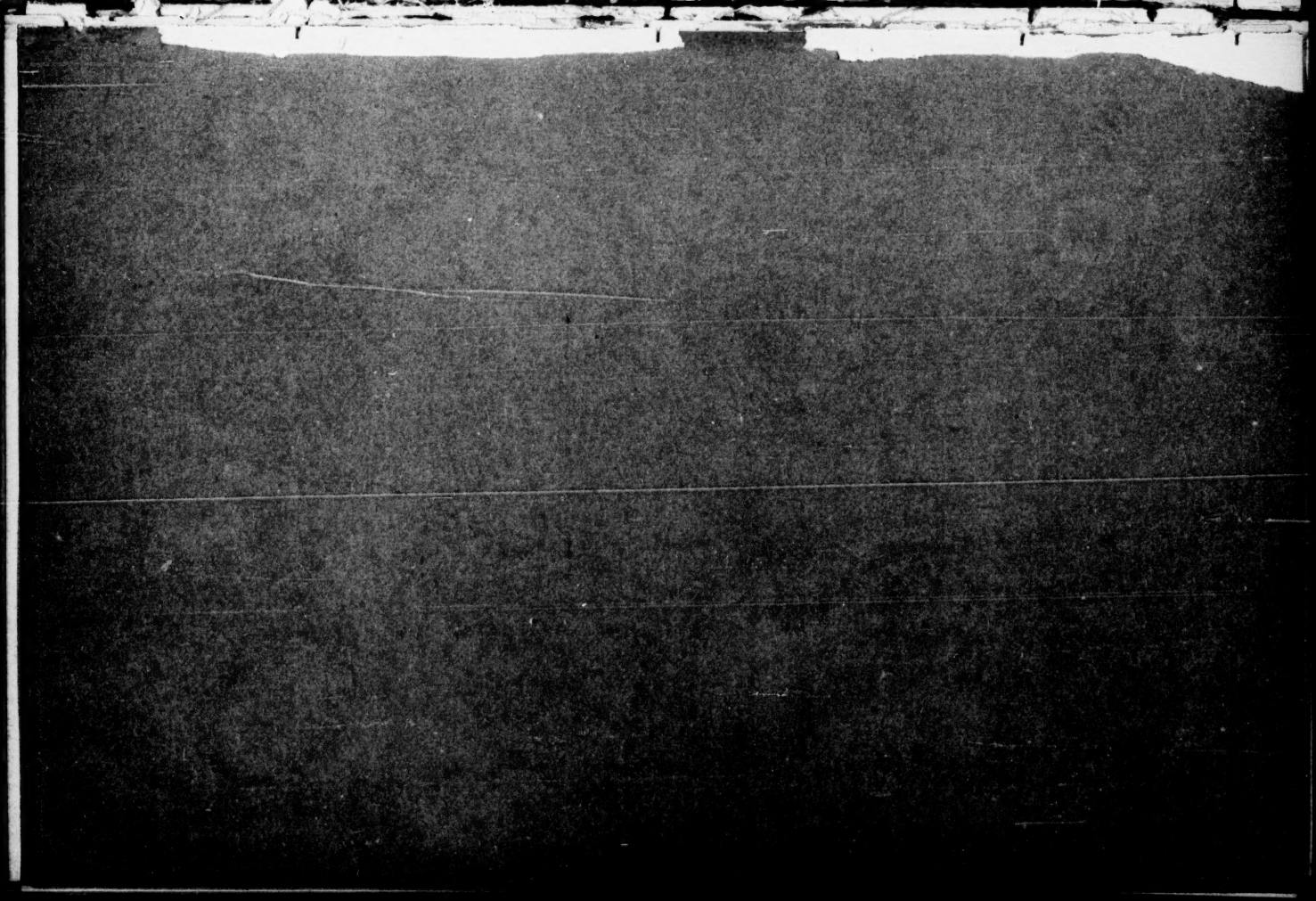
vs.

D. N. Dilla,

Defendant in Error.

Brief of Defendant in Error.

WALTER VAN DYKE,
Attorney for Defendant in Error.



In the Supreme Court of the United States.

No. 194.

WALTER BOHALL,
PLAINTIFF IN ERROR,

vs.

D. N. DILLA,
DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The action is ejectment, and the title of the defendant in error is a United States patent.

The parties hereto were contesting claimants for the land in controversy, under the United States pre-emption law.

U. S. Revised Statutes, Sec. 2259.

And the same was awarded to the defendant in error, after a trial and contest before that department.

A full statement of the respective claims of the parties will be found in the decision of the Commissioner of the General Land Office.

Record, folios 29 to 31.

The substance of the whole controversy may be stated thus:

The plaintiff in error failed to prove to the satisfaction of the Land Department, that he was a *bona fide* resident of the land.

The defendant in error did prove to the satisfaction of that department that he had fully complied with the pre-emption law, and was entitled to the land.

The findings of the trial Court state the result of the trial between these parties before the Land Department, to wit:

"12th. In said action or contest judgment was given to the effect that plaintiff (defendant in error here) was a qualified pre-emptor, and as such that he was entitled to enter, pay for, and receive from the United States a patent for the land in controversy herein.

"13th. In said action or contest it was adjudged and found that the defendant had not complied with the pre-emption law as regards residence upon the land in controversy, and was not entitled to enter the same under said law."

Record, folio 51.

I.

It is a principle, universally applicable to cases of this character, that the party assailing the patent must show that he possessed all the necessary qualifications of a pre-emptor.

Burrell v. *Haw*, 48 Cal., p. 222.

"Inhabitancy, a *bona fide* residence upon the land is one of the indispensible conditions to be complied with by a party seeking to pre-empt. This fact must be established to the satisfaction of the proper officers of the Land Office. If the applicant fail in this point alone it is fatal to his claim, and however fraudulent may have been the conduct of his contesting adversary, he is not in a condition to attack the proceeding."

Burrell v. *Haw*, 48 Cal., p. 428.

Dunn v. *Schneider* 20 Wis., p. 510.

In this case the parties were contesting pre-emptors, and the trial Court expressly finds:

"In said action or contest it was adjudged that the defendant (plaintiff in error) had not complied with the pre-emp-

tion law, as regards residence upon the land in controversy, and was not entitled to enter the same under said law."

Record, folio 51.

Such bing the case the judgment of the Supreme Court of California should be affirmed.

II.

But the plaintiff in error seeks to avoid this *fact* by the assumption that the Land Officers committed an error of *law* in thus finding.

That the Court can relieve against a mistake of law, or when under the *undisputed facts* the *law* gives the land to one and the Land Department to another, is a proposition well established by the authorities. But it must be as stated by this Court, a *clear* mistake of law, or, in other words, it must be a mistake of law *purely*, arising on undisputed, *ultimate*, not *probative* facts.

"This means, and it is a sound principle, that where there is a mixed question of law and of fact, and the Court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive."

Marquez v. *Frisbie*, 101 U. S. Rept., p. 476.

The rule is again so clearly announced and explained in *Quimby* v. *Conlon*, 104 U. S. Supreme Court Reports, that it seems this question should be considered as settled. Says the Court in that case: "The laws of the United States prescribe with particularity the manner in which portions of the public domain may be acquired by settlers. They acquire personal settlement upon the lands desired, and then inhabitation and improvement. * * * By them a Land Department has been created to supervise all the various steps required for the acquisition of the title of the Government. Its officers are required to receive, consider and pass upon the proofs furnished as to the alleged settlements upon the lands and their improvement when preemption rights are claimed, and in case of conflicting claims

to the same tract, to hear the contesting parties. * * * For mere errors of judgment as to the weight of evidence on these subjects by any of the subordinate officers, the *only* remedy is by an *appeal* to his superiors of the department."

Quimby v. *Conlon*, 104 U. S. Sup. Court Repts, p. 425.

And after stating that the Court may relieve against a mistake of law on the part of these officers, the Court add with particularity: "And we may also add, in this connection, that the misconstruction of the law by the officers of the department, which will authorize the interference of the Court, must be clearly manifest, *and not alleged upon a possible finding of the facts from the evidence different from that reached by them.*

Ib., p. 426.

The failure of the Commissioner to make proper and legal deductions from the testimony, and his failure for any reason to give testimony as much weight as it deserves in the exercise of a proper legal discretion, is not such a mistake of *law* as can be corrected by the Courts. The finding of the Commissioner, approved by the Acting Secretary of the Interior, that Bohall, plaintiff in error, "had clearly failed to comply with the requirements of the pre-emption law as regards residence."

Record, folio 30,

does not present a *purely legal* question, and his conclusion in this respect is the governing and controlling *fact* in this case, unless this Court has authority to set it aside as being against the evidence, and to make a different deduction from the probative facts. But this the Courts have no power to do.

Shipley v. *Cowan*, 91 U. S., pp. 339 and 340.

"We are not permitted here to pass upon the sufficiency of the testimony upon which their decision is based, and although it may appear to be unsatisfactory and wholly insufficient to warrant the final conclusion reached."

Burrell v. *Haw*, 48 Cal., p. 225.

To sum up the argument on this point: Residence or non-residence is a mixed question of law and of fact. And this Court cannot say that the Commissioner of the General Land Office made a mistake of *law*, because that officer, upon evidence before him, found that Bohall was not a *bona-fide* resident. In the language of this Court, already quoted, the mistake of law must not be alleged upon a possible finding of the facts from the evidence different from that reached by them. Take this case:

After the initiation of his pre-emption claim in 1868 the plaintiff in error lived upon the land in controversy for ten months, and then he removed from it and was gone *two years and two months;* returned and remained six months, when he again moved away with his family a distance of eighty miles, remaining absent *two years and four months;* then came back and lived on the land *two months*, and left it again and remained away for about *six months. He was not living on the land when he filed his declaratory statement*, nor had he been for *one year and five months.* Nor after filing upon it did he go upon the land for a period of *ten months.* And during the whole time he claimed this land from 1868 to 1875, a period of nearly seven years, he and his family lived elsewhere for about *five* years. It was upon this state of facts that the Commissioner was to decide whether Bohall was an *inhabitant* of this land during the five years he was living with his family miles away from it. In doing so he must necessarily consider the excuses made by the plaintiff in error for these long absences, and give them such weight as he deemed proper in arriving at his intention. He did so, and the trial Court finds:

"The Commissioner of the General Land Office did not find as a fact that the defendant (plaintiff in error here) was a *bona fide* pre-emptor, nor that when he removed from the land at the times stated in his decision that he did so with the intention of returning, nor that his absence was temporary and without an intention of changing his residence."

Record, folio 50.

Looking at all the evidence and facts before him the Commissioner found upon the ultimate fact submitted to him for decision:

"Bohall has clearly failed to comply with the law as regards residence. The pre-emption law requires a continuous personal residence. This Bohall has not had, and the residence by his tenants will not operate to cure the defect."

Record, folio 30.

And can this Court say that such conclusion from all the evidence was erroneous in point of law, without finding the very facts as to Bohall's intent, which the Court below declares the Commissioner did not find.

Viewed in any light, this Court is asked to substitute its judgment for that of the Land Department, as to the insufficiency of Bohall's residence; to re-try the case and reverse the judgment of that Department.

III.

The Question of Fraud.

The fraud alleged, is in substance that about eight years before the land in controversy was surveyed, the defendant in error made an agreement to purchase from the plaintiff in error, his possessory right to the land, and as a fruit of such contract, entered into its possession. That such agreement was fraudulent on the part of defendant in error, in this: that when he made it, he never intended to comply with its terms as to payment, and never did pay plaintiff in error, as agreed.

Record, folio 4 to 6.

In May, 1868, plaintiff in error, electing to treat the contract as void for the reason stated, received from defendant in error, possession of the land, and thereafter in the summer of 1868, he made a pre-emption settlement thereon.

Record, folio 8.

It will thus be seen, that before plaintiff in error ever settled upon this land with a view to pre-empt it, he had restored to him by a suit at law, *all* that he gave to defendant in error under this fraudulent contract. This previous fraud in no manner prevented the plaintiff in error from inhabiting the land, after his settlement, and thus complying with that requirement of the law. It is equally certain from the findings of the Court, that the pre-emption claim of plaintiff in error was rejected solely for the reason that he did not reside upon the land after its possession had been restored to him.

The claim of the plaintiff in error, on this point is, that defendant in error should be charged not only with a consequence which did not arise out of such fraud, but with that which was the result of the failure of plaintiff in error to comply with the pre-emption law;

That it was the duty of the Land Department when this fraud was called to its attention, to award the land to plaintiff in error, although in its judgment he had failed to show a residence upon it.

But was the failure of Bohall to reside upon the land excused by the alleged fraud of Dilla, which in no manner prevented his residing there? Did that department commit an error of law or violate any established principle of equity in holding that the provision of the pre-emption law requiring a *bona fide* residence upon the land claimed was applicable to Bohall, and that in not complying with such provision he was no more entitled to pre-empt than any other person who failed to do so.

That this alleged fraud upon the part of Dilla is no ground for a decree in favor of the plaintiff in error, he having failed to prove that he had complied with the pre-emption law as regards residence is decided in

Dunn v. *Schneider*, 20 Wis., p. 510.

IV.

The plaintiff in error not having shown that he had an equity coupled with the right as against the United States to acquire the legal title is not in a position to attack the U. S. patent, upon the ground of the insufficiency of residence of defendant in error, or because of the manner in which he obtained the possession.

Burrell v. *Haw*, 48 Cal., 222;
Hedley v. *Leonard*, 35 Mich., 71.

The United States Government having examined the claim of plaintiff in error, and finding that he had no legal or equitable right as against it to demand a patent for the land in controversy, he cannot question the right of that Government to convey the land to whom it pleases, and he is in no manner wronged, even though it should be satisfied to give it to one whose possession was insufficient or fraudulent.

Durfee v. *Plaistel*, 38 Cal., 83.

In fact no case has come under our observation where a Court has declared that the patentee held the land conveyed thereby in trust for a person who was not entitled to the legal estate by reason of his non-compliance with law.

CONCLUSION.

In the foregoing we have endeavored to maintain:

1st. That the finding of the land officers that plaintiff in error failed to comply with the pre-emption law as regards residence is the finding of a *fact* and cannot be set aside by the Courts under the pretext that it is a *mere* conclusion of *law*, and "that to argue against the validity of such finding upon the ground that such conclusion on the very point referred to there is erroneous in law, is in effect the same thing as to dispute the judgment which they found upon the evidence."

2d. That upon the ultimate facts found by the land officers this Court cannot say they erred in refusing to give the land to the plaintiff in error; nor were such facts found

by them against the evidence, even if this Court could review that evidence and pass upon the weight of probative facts.

3d. That the Commissioner did not commit an error of law in holding that the pre-emption law requires a *home*, or what is the same thing "a continuous personal residence," actual or constructive, upon the land claimed under it.

4th. That the plaintiff in error having lost *nothing* by the fraud alleged, that matter is irrelevant upon the case, as it stands.

5th. That the plaintiff in error not being entitled to the *title* conveyed by the patent, is not in any position to call upon defendant in error to show by what means he obtained it.

It is respectfully submitted that the judgment of the Supreme Court of California should be affirmed.

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